Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in cases where jurisdiction is predicated on the Foreign Sovereign Immunities Act of 1976 ("FSIA"), federal courts should apply federal common law choice of law rules, as held repeatedly by the Ninth Circuit, or, in contrast, the forum state's choice of law rules, as held repeatedly by the Second Circuit and in this case.

2. Whether in determining and interpreting applicable foreign law under Fed. R. Civ. P. 44.1, federal courts should conduct an independent examination of foreign law, as held by the Seventh Circuit, and not presume that foreign law is analogous to U.S. law, as the Second Circuit did in this case.

PARTIES TO THE PROCEEDING

The Ministry of Finance of the Republic of Indonesia participated as a non-party Respondent-Appellant below. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara was the Respondent-Appellant below. Karaha Bodas Company, L.L.C. was Petitioner-Appellee below.

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The Ministry of Finance for the Republic of Indonesia ("Ministry") respectfully petitions this Court for a writ of certiorari to review the judgments in this action of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's April 24, 2002 Final Order is unreported (Pet. App. 1a). The Second Circuit's December 10, 2002 Opinion ("*Pertamina I*") is reported at 313 F.3d 70 (Pet. App.7a).

The district court's October 6, 2004 Opinion (Pet. App. 41a) and its October 22, 2004 Final Judgment (Pet. App. 61a) are unreported. The Second Circuit's March 9, 2006 Summary Order (Pet. App. 68a) is unreported.

JURISDICTION

The Summary Order of the Second Circuit affirming the district court's Final Judgment was entered on March 9, 2006, and no petition for rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

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[1] Although not a formal party to the underlying dispute, the Ministry is nonetheless entitled to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1). *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 461 (1968) (unanimous) (exercising jurisdiction where the petitioner was adversely affected by an appellate decision but did not participate in the case before filing a petition for certiorari); *see also Devlin v. Scardelletti*, 536 U.S. 1, 8 (2002). In *Pertamina I*, the Second Circuit held that the Ministry could appeal the district court's Final Order as a non-party because the Ministry's claim that it owned "the property encompassed by the garnishment order" gave the Ministry an "'affected interest'" that entitled the Ministry to join the appeal. Pet. App. 20a (quoting *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999)).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (2000), are reproduced at Pet. App. 73a.

STATEMENT OF THE CASE

This case concerns the attachment by federal courts for over four years of nearly $310 million in revenues from the sale of liquefied natural gas ("LNG Revenues") and refined petroleum products ("Refinery Revenues") that under the Indonesian Constitution belong to the Republic of Indonesia ("Republic") for the benefit of the Indonesian people. These revenues are used by the Republic, *inter alia*, to maintain critical foreign-exchange reserves, pay sovereign debt, fund its national budget, and provide oil-based fuels to the Indonesian people at subsidized prices. Although the revenues are owned by the Republic, they pass through trust accounts in the name of the Republic's independent state-owned oil and gas company, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"). The Republic paid Pertamina a fee in Jakarta for its LNG services and authorizes Pertamina to use the Refinery Revenues to continue producing oil-based fuels.

Respondent Karaha Bodas Co., L.L.C. ("KBC") restrained these sovereign revenues to satisfy a judgment against Pertamina. The district court's subject matter jurisdiction over the restrained funds was predicated on the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA"). The Ministry appeared as a non-party with interest and argued below that the FSIA deprived the district court of subject matter jurisdiction to restrain the revenues because under Indonesian law the LNG and Refinery Revenues are the Republic's property and, as the Republic was not the judgment debtor or responsible for

satisfying the judgment, its property was immune from restraint and execution under 28 U.S.C. §§ 1609-1610. The Ministry further argued that to the extent Pertamina had any future interest in the LNG Revenues, that interest accrued in Jakarta, Indonesia and, therefore, Pertamina's interest was not "property in the United States" subject to restraint and execution under 28 U.S.C. §§ 1609-1610.

The district court and Court of Appeals ignored the Ministry's FSIA arguments. Instead, they proceeded to determine ownership of the LNG and Refinery Revenues based on New York choice of law principles that derogated from the express requirements of the FSIA that the property attached be "in the United States," and eschewed any independent examination of applicable Indonesian law governing the Refinery Revenues in favor of a presumption that U.S. law was analogous to the foreign law.

Statutory Background. The FSIA prescribes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989). Under the FSIA, a federal court must satisfy itself at the "threshold of every action" against a foreign state whether an exception to sovereign immunity specified in the statute permits the exercise of federal jurisdiction. *Verlinden*, 461 U.S. at 493–94; *see also Amerada Hess*, 488 U.S. at 434–35.

The FSIA specifically includes immunity from compulsory attachment and execution on property. Section 1609 of the FSIA provides in relevant part that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609.

Section 1610 sets forth the limited exceptions to the broad immunity conferred in section 1609. Section 1610(a) provides seven specific exceptions to immunity from execution and attachment in aid of execution for the property of a foreign state (including its agencies and instrumentalities), but only if the property meets two threshold criteria: (i) it must be "property in the United States" that is (ii) "used for commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(b) extends the threshold criteria under section 1610(a) to also include "any property in the United States" of an agency or instrumentality of a foreign state "engaged in commercial activity in the United States." 28 U.S.C. § 1610(b).

The Republic's LNG Revenues and Pertamina's Retention Fee. The Indonesian Constitution and laws creating Pertamina embody the principle that the sovereign has dominion over and, therefore, owns all natural resources and the revenues generated therefrom "for the greatest possible prosperity of the people." Pet. App. 9a (quoting Elucidation of Art. 33 of the 1945 Constitution of the Republic of Indonesia). To fulfill this constitutional mandate, the Republic authorizes Pertamina to enter into Production Sharing Contracts ("PSCs") with contractors licensed to extract and develop Indonesia's oil and natural gas resources in cooperation with Pertamina. Pet. App. 13a-14a.

Buyers of Indonesian LNG remit payments to trust accounts in New York. Pet. App. 14a. After the trustee services debt and deducts other specified charges and fees, the LNG Revenues are shared between the PSC contractors and Pertamina according to the terms of the PSCs. *Id.* The trustee allocates the respective shares to sub-accounts maintained in the contractors' and Pertamina's names. Pet. App. 15a. Because Pertamina takes its share under each PSC on behalf of the Republic, Pertamina has instructed the

trustee, as mandated by Indonesian law, to distribute the entirety of Pertamina's nominal share directly to Bank Indonesia's (Indonesia's central bank) foreign exchange reserve account at the New York Federal Reserve Bank. Pet. App. 15a, 38a & n.19. The LNG Revenues are used by the Republic to fund a substantial portion of the national budget, maintain Indonesia's foreign exchange reserves, and service Indonesia's foreign debt. Pet. App. 15a, 30a.

Until 2003, Pertamina received a Retention Fee from the Republic for the LNG services it provided. Pet. App. 24a-25a, 39a. Pursuant to Indonesian law, this fee amounted to "'5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.'" Pet. App. 24a (quoting Government Regulation of the Republic of Indonesia No. 41 of 1982, Art. 5(1)). Pursuant to Ministry of Finance directives, the long-standing practice was to pay the Retention Fee to Pertamina in Jakarta only after the share of LNG Revenues nominally allocated to Pertamina was credited to the Republic's treasury account at Bank Indonesia in Jakarta. Pet. App. 24a-25a & n.13.

The Republic's Refinery Revenues. Indonesian law requires that the Republic supply oil-based fuel (known by its Indonesian language acronym as "BBM") to the Indonesian people at below-market prices. *See* Pet. App. 51a-52a. The Republic has delegated to Pertamina the authority to supply BBM at prices subsidized by the Republic. Pet. App. 52a. The BBM system operates on a no-profit, no-loss basis. *Id.* Any profit goes to the Republic and any loss is subsidized by the Republic. Pet. App. 52a-53a.

To accomplish its BBM objectives, Pertamina, on behalf of the Republic, operates oil refineries that were financed and built by the Republic. In addition to producing oil-based fuels, these refineries also produce products that are not used for BBM. Pet. App. 53a. These non-BBM products are sold

both in the domestic market and as exports. *Id.* The Refinery Revenues at issue in this case are revenues from the export of such non-BBM products. *Id.* Nonetheless, the revenues from the sales of these products are used in the BBM system as a "cost reducing factor" in calculating the Republic's subsidy, such that they are treated as reducing the refinery's costs, thereby reducing the amount of the Republic's subsidy or increasing the Republic's profit. *Id.* In exchange for its BBM services, Pertamina is paid a per barrel fee and a 2% commission on non-BBM exports.

KBC's Attachment of the LNG and Refinery Revenues. In December 2000, KBC obtained an arbitral award in the amount of $261.1 million plus interest against Pertamina for breach of a geothermal development project contract unrelated to the PSC contracts. Pet. App. 11a. The arbitral panel dismissed the Republic holding it was not a proper party to the arbitration proceeding or to the contract. *Id.* In December 2001, the U.S. District Court for the Southern District of Texas confirmed that arbitral award and entered a final judgment against Pertamina in the amount of the award plus interest ("Texas Judgment"). Pet. App. 12a. KBC registered the Texas Judgment in the U.S. District Court for the Southern District of New York and that court issued an *ex parte* Writ of Execution and Order to Show Cause. *Id.* KBC immediately served Restraining Notices pursuant to N.Y. C.P.L.R. § 5222(b) on banks in New York that held the trust accounts containing the LNG and Refinery Revenues. Pet. App. 12a-13a. The bank trustees began restraining all oil and gas revenues allocated to the sub-accounts in Pertamina's name. As noted, the Republic appeared as a non-party with interest, challenging the district court's subject matter jurisdiction under the FSIA to restrain the LNG and Refinery Revenues contained in the sub-accounts in Pertamina's name. Pet. App. 16a.

The District Court's Determination of Ownership of the LNG Revenues. The district court bifurcated the case for ease of adjudication. In a Final Order dated April 24, 2002, it determined that under Indonesian law, Pertamina had a property right in the restrained LNG Revenues to the extent of the Retention Fee, while the remainder was owned by the Republic. Pet. App. 5a. Ownership of the Refinery Revenues was left for a later date. Pet. App. 5a-6a. The district court therefore concluded that KBC could execute only upon the portion of the restrained LNG Revenues equal to the Retention Fee and that the remaining revenues could not be executed upon. Pet. App. 5a.

The Second Circuit's Decision Regarding Ownership of the LNG Revenues. Although on appeal the Second Circuit held that "the Republic . . . is a 'foreign state' within the meaning of the FSIA," Pet. App. 8a (quoting 28 U.S.C. § 1603(a)), its evaluation of the Republic's FSIA claim stopped there. It failed to address *inter alia* whether, as the Republic claimed, Pertamina's future interest in the Retention Fee was not subject to restraint or execution from a portion of the LNG Revenues equal to the Retention Fee because Pertamina's interest accrued in Jakarta, Indonesia and therefore, was not "property in the United States" under 28 U.S.C. §§ 1609-1610. Instead, the Second Circuit held: "Because this is an appeal from an order executing a judgment against the property of Pertamina—as opposed to the property of the Ministry or the Republic of Indonesia—the sovereign immunity claims of the Ministry or the Republic of Indonesia are not before us." Pet. App. 22a n.12.

As discussed in more detail in Point I of the Reasons for Granting the Petition, the Court of Appeals went on to apply New York choice of law rules to determine the LNG Revenues' susceptibility to execution, and concluded that under New York substantive law Pertamina's future interest

in the Retention Fee could be restrained and executed on from a portion of the LNG Revenues equal to the Retention Fee. Pet. App. 22a-23a, 39a-40a.

The Second Circuit thus affirmed the district court's decision. It also instructed the district court to continue the stay of its judgment or substitute a similar stay until a final determination is made of the parties' rights to the disputed funds. Pet. App. 40a. In this manner, the Court of Appeals sanctioned the restraint of the Republic's LNG Revenues and subjected the Republic to more than four years of the attendant burdens of litigation from which the Republic was clearly immune under the FSIA.

The District Court's Decision on Ownership of the Refinery Revenues. In an Opinion dated October 6, 2004, the district court determined that the Refinery Revenues belonged to Pertamina because those funds were transferred directly into Pertamina's general operating funds, were used to reduce Pertamina's refinery costs, and carried as revenues on Pertamina's financial statements. Pet. App. 54a-55a. On October 22, 2004, the district court issued the Final Judgment, ordering the turnover of the entire amount of the Texas Judgment from revenues that had been kept restrained. Pet. App. 67a. The court stayed its order pending appeal and review by this Court. *Id.*

The Second Circuit's Decision Regarding Ownership of the Refinery Revenues. The Ministry appealed the Final Judgment challenging two opinions of the district court concerning the amount of Retention Fees restrained as well as the October 6 Opinion that Pertamina owned all the Refinery Revenues. On March 9, 2006, in a Summary Order, the Second Circuit affirmed the district court's opinion that Pertamina owned all of the Refinery Revenues as well as the Final Judgment. Pet. App. 70a, 72a. The Second Circuit decided the appeal only on the basis of ownership of the

Refinery Revenues, thus obviating a decision on whether the district court correctly determined the Retention Fee portion of the amounts restrained and whether Pertamina's interest in the Retention Fees was "property in the United States" that could be restrained or executed on under §§ 1609-1610 of the FSIA.

As discussed in more detail in Point II of the Reasons for Granting the Petition, the Court of Appeals held that the Refinery Revenues belonged to Pertamina based on a presumption that the Republic's rights to those funds was only as a guarantor of Pertamina's BBM operations and without any independent analysis of the applicable Indonesian law establishing the Republic's rights vis-à-vis those funds. The Court's transposing of U.S. legal principles onto a relationship between the Republic and Pertamina governed by Indonesian legal principles that do not have exact equivalents in U.S. law constitutes a fundamental disregard of applicable foreign law, disrespects principles of international comity, and is an erroneous and untenable approach to determining and interpreting foreign law.

The Second Circuit stayed turnover and execution until final review by this Court. Pet. App. 72a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE SQUARELY PRESENTS AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE OPENLY DIVIDED: WHETHER THE FSIA REQUIRES FEDERAL COMMON LAW OR FORUM CHOICE OF LAW RULES

A. There is a direct, open conflict in the courts of appeals over whether the FSIA requires a federal court to apply a federal common law choice of law rule or the forum state's rules. *Compare, e.g.*, Pet. App. 25a ("'[T]he FSIA implicitly requires courts to apply the choice of law provisions of the

forum state with respect to all issues governed by state substantive law.'") (quoting *Barkanic v. Gen. Admin. of Civil Aviation of the P.R.C.*, 923 F.2d 957, 959 (2d Cir. 1991)), *and Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996) (applying forum choice of law rule to case predicated on FSIA jurisdiction), *with, e.g., Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("In this [FSIA] context, federal common law choice of law rules apply, not the choice of law rules of the forum state."), *Schoenberg v. Exportada de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) ("[J]urisdiction in this case is based on FSIA, not diversity. Therefore, federal common law applies to the choice of law rule determination."), *and Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989) ("[F]ederal common law provide[s] the appropriate choice of law rule in cases arising under the FSIA."). *See generally Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 887 (8th Cir. 2001) ("In a FSIA case, 'there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern . . . .'") (quoting 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3662 (2d ed. 1995)); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) ("Demonstrably, the law is unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases.") (noting conflict between Second and Ninth Circuits); *Dammareli v. Islamic Republic of Iran*, No.Civ.A. 01-2224JDB, 2005 WL 756090 at *18 (D.D.C. March 29, 2005) (same); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) (same); *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1336 n.61 (E.D. Pa. 1992) (same).

This conflict is intolerable because foreign states subject to jurisdiction in U.S. courts under the FSIA, either as defendants or as owners of property faced with attachment or execution, will face inconsistent standards on an issue as fundamental as what choice of law rule will control the substantive laws to which the foreign states or their property will be subject. This circuit split is especially provocative because of the heightened concern for nationally uniform standards under the FSIA. *E.g.*, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts.") (internal quotation marks omitted); H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631 (noting Congress's intent to promote a "uniformity of decision" in "cases involving foreign sovereigns" and Congress's concerns about "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

As detailed below, this inter-circuit conflict should be resolved by this Court in favor of a federal common law choice of law rule for federal courts exercising jurisdiction under the FSIA. A federal common law choice of law rule can lead to the creation of a federal rule of decision or the adoption of state law as the federal rule of decision when the origination of a federal rule is unnecessary. In contrast, state choice of law rules, lacking this flexibility, do not permit the creation of federal rules of decision, and can lead to results that conflict with important federal interests under the FSIA—as occurred in this case.

B. This case squarely presents the circuit split. The Court of Appeals applied New York choice of law rules to

determine the susceptibility to execution of the restrained funds and, as a result, concluded that under New York substantive law, a portion of the restrained funds was subject to execution because that portion of the funds represented Pertamina's "future interest" in the Retention Fee that the Republic pays Pertamina in Indonesia:

> In the instant action, the district court is located in New York state. We therefore apply New York law to determine what assets are "subject to enforcement, and thus available to judgment creditors." . . .
>
> "A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . . ."
>
> . . . .
>
> . . . "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

Pet. App. 22a-23a (quoting, first, *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999), then N.Y. C.P.L.R. § 5201(b), and then New York state cases).

The Court of Appeals relied on two authorities to support its conclusion that state choice of law rules control whether any of the restrained funds are subject to execution: (i) a section of the FSIA, 28 U.S.C. § 1606; and (ii) Rule 69 of the Federal Rules of Civil Procedure. *See* Pet App. 22a. Section 1606 provides:

§ 1606. Extent of liability

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state *shall be liable in the same manner and to the same extent as a private individual under like circumstances* . . . .

(Emphasis added.) By its plain terms, § 1606 applies to "liability," not susceptibility to attachment or execution. Indeed, the section refers solely to immunity under §§ 1605 or 1607 (liability immunity provisions)—not to immunity under §§ 1610 or 1611 (attachment and execution immunity provisions).

In addition, Congress borrowed the operative language in § 1606 (italicized in the block quotation above) directly from an analogous provision of the Federal Tort Claims Act (FTCA), the statute that restricts the sovereign immunity of the United States: "The United States *shall be liable*, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances* . . . ." 28 U.S.C. § 2674 (emphasis added). Congress clearly did not intend that such language—which should be construed *in pari materia*—govern choice of law as well as extent of liability, because Congress supplied an explicit choice of law provision in the FTCA, providing for jurisdiction over claims "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred*." 28 U.S.C. § 1346(b)(1) (emphasis added). There is no equivalent choice of law provision in the FSIA. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987) ("The upshot is that the FSIA lacks a section corresponding to FTCA § 1346(b)."). Thus, neither § 1606 nor any other provision of the FSIA provides for choice of law.

Next, the Court of Appeals relied on Rule 69 as a basis for choosing forum law, but Rule 69 invokes only state "practice and procedure," and, in all events, makes clear that state procedures bow to federal law:

> The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, *except that any statute of the United States governs to the extent that it is applicable.*

Fed. R. Civ. P. 69(a) (emphasis added); *see also* Fed. R. Civ. P. 69 advisory committee's note to subdivision (a) ("Statutes of the United States on execution, when applicable, govern under this rule. . . . Special statutes of the United States on exemption from execution are also continued.") (1937 Adoption).

Thus, Rule 69 cannot settle the question of choice of law under the FSIA because the rule simply reverts to the FSIA, which is silent on choice of law. Accordingly, the Court of Appeals's reliance on § 1606 and Rule 69 was misplaced. As a result, the court looked to New York's choice of law rules, which in turn led to New York substantive law on the susceptibility of the restrained funds to execution.

The New York substantive rule—under which a portion of the restrained funds was subject to execution as representing Pertamina's "future interest" in the Retention Fee—was inadequate in this case because it failed to account for the *extraterritoriality* of both Pertamina's interest in the Retention Fee, and the Republic's corresponding obligation to pay it, both of which occur exclusively in Jakarta, Indonesia and arise solely under Indonesian law. The interest is

indisputably extraterritorial because both the Republic's obligation to pay, and Pertamina's interest in receipt of the Retention Fee, arise in Indonesia under Indonesian law and have been carried out exclusively and invariably in Indonesia.[2]

C. The extraterritoriality of Pertamina's interest in the Retention Fee is critical because under the FSIA, the property of a foreign state is only subject to attachment or execution if the property is "in the United States." *See* 28 U.S.C. §§ 1609-1610. If such property is outside the United States, the property is absolutely immune from attachment and execution. *E.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (noting that the FSIA "does not empower United States courts to levy on assets located outside the United States"); *Fid. Partners, Inc. v. First Trust Co. of N.Y.*, 58 F. Supp. 2d 55, 61 (S.D.N.Y. 1999) ("[E]ven where an agency of a foreign state has waived immunity from jurisdiction, only assets of that foreign agency which are located in the United States may be subject to post-judgment attachment.").

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[2] *See* Government Regulation 41/1982, Art. 4(3) (providing that Pertamina is obligated to pay the Government's portion of the PSC gas revenues to the Treasury Account and Foreign Exchange Account at Bank Indonesia); Ministry of Finance Directive MK/IV/12/1976 dated December 16, 1976 (providing Pertamina could only receive the Retention Fee from the Ministry's Foreign Exchange Account after all gas revenues from the PSCs had been received into that account); Ministry of Finance Directive S-384/MK.012/1984 dated March 28, 1984 (directing Bank Indonesia on the amount to pay Pertamina for its Retention Fee from the Ministry's Foreign Exchange Account); *see also* Pet. App. 15a; Pet. App. 38a n.19 (recognizing Pertamina's "long-standing practice . . . to hand over funds from PSCs directly to the Republic of Indonesia").

This territorial limitation on attachment and execution of a foreign state's property derives from the pre-FSIA rule that *all* property of a foreign state was absolutely immune from execution—even if the foreign state had been adjudicated liable. *E.g.*, *Morel de Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) ("[P]rior to 1976 property of foreign states was absolutely immune from execution."); *see also Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995) ("Prior to the enactment of the FSIA . . . the international rule, accepted by federal common law, [was] that the property of foreign sovereigns was absolutely immune from attachment. *The FSIA did not alter that rule, other than to create the exceptions contained in §§ 1610-1611.*") (emphasis added); H.R. Rep. No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626 ("Sections 1610(a) and (b) are intended to modify th[e rule of absolute immunity] by *partially lowering the barrier of immunity from execution*, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.") (emphasis added).

Pertamina's interest in the Retention Fee indisputably lies in Indonesia. As noted, under Indonesian law, the Republic pays Pertamina the Retention Fee in Indonesia only *after* Pertamina has first transferred the *entirety* of the LNG Revenues to the Ministry's Treasury Account at Bank Indonesia. Pet. App. 35a-38a & n.19. Because the Republic's obligation to pay Pertamina the Retention Fee arises solely under Indonesian law, the territoriality of that obligation—as well as Pertamina's corresponding interest in that payment—lies in Indonesia.

The extraterritoriality of Pertamina's interest in the Retention Fee was not, however, cognizable under New York law, which simply equated Pertamina's interest in receiving the Retention Fee in Indonesia with a future ownership

interest in the restrained funds and a corresponding susceptibility to execution—despite Pertamina's unflagging obligation to transfer *all* of such funds directly to the Republic:

> While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. . . . "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

Pet. App. 39a-40a (quoting New York state cases) (citations omitted).

D. Despite Indonesian legal requirement and practice for payment in Indonesia, the Court of Appeals determined that Pertamina's future interest under New York law constitutes "property in the United States" and, therefore, was subject to execution under 28 U.S.C. § 1610(b)(1) because Pertamina had waived its immunity. Pet. App. 22a, 26a.

But the definition of what constitutes "property in the United States" for purposes of attachment and execution under the FSIA cannot be left to the vagaries of state choice of law rules. Particularly given Congress's concerns over uniformity in suits against foreign states, the question of what constitutes "property in the United States" under the FSIA must be determined consistently by a uniform, federal common law choice of law rule, which in circumstances analogous to those here would lead to a federal rule of decision as well. Otherwise, a foreign state subject to a judgment registered in several districts across the country, for example, could face a multiplicity of results regarding what

constitutes "property in the United States" and could receive conflicting immunity determinations for properties that are identically situated except for state boundary lines.

In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*"), this Court described the circumstances in which the federal interest in uniformity in international relations and FSIA immunity determinations dictates that a federal court exercising jurisdiction under the FSIA apply federal common law instead of forum law, both as the choice of law rule and the substantive rule of decision.[3]

The *Bancec* Court rejected the argument that § 1606's language "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances" required the application "of the law of the forum . . . including its conflict principles" to the issue in dispute. *Id.* The Court explained that while the FSIA required the application of a state law rule of liability governing private individuals to foreign states in like circumstances, "[t]he statute is silent, however, concerning the rule governing the attribution of liability *among* entities of a foreign state." *Id.* The Court went on to state that in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), it

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[3] *Bancec* addressed whether an agency or instrumentality of a foreign sovereign could be liable for the actions of the sovereign, and held it could be liable if the presumption of juridical separateness between the entity and the sovereign were overcome by the showings traditionally required to pierce corporate veils of separateness. *Bancec*, 462 U.S. at 630-32. "Veil-piercing" is not at issue in this case because the arbitral award that underlies the judgment held exactly the opposite. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (In re Karaha Bodas Co.)*, 190 F. Supp. 2d 936, 953 (S.D. Tex. 2001) (noting that the preliminary arbitral award specifically found that the Ministry was not Pertamina's alter-ego), *aff'd* 364 F.3d 274, 284 (5th Cir. 2004) (same).

declined to apply the State of New York's act of state doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." *Bancec*, 462 U.S. at 622 n.11 (citation and internal quotation marks omitted). In thus applying federal common law both as the choice of law rule and the substantive rule of decision, the *Bancec* Court noted that "federal common law . . . in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623. *Bancec*'s choice of law analysis under the FSIA, and its emphasis on the need for uniformity, apply equally here given the analogous issues of attribution of ownership interests in property "*among* entities of a foreign state" and the "amenability" of that property to execution in a U.S. court. *Id.* at 622 n.11.

Moreover, a federal common law choice of law rule also is necessary to prevent results that conflict with federal interests. A federal common law choice of law rule may lead to adoption of state law as the federal rule of decision, *e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), but not if the state rule were repugnant to an overarching federal interest. Instead, federal common law would apply. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (holding that despite limits on the creation of federal common law, it is nonetheless required "where there is a 'significant conflict between some federal policy or interest and the use of state law'") (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

Permitting execution on Pertamina's "future interest" under New York law in the restrained funds—based on Pertamina's right to receive the Retention Fee in

Indonesia—undermines the absolute immunity from execution under the FSIA for a foreign state's property outside the United States. *See Fid. Partners, Inc.*, 58 F. Supp. 2d at 61. If a U.S. court could execute on an obligation owed to a foreign state outside the United States through an execution on the foreign state's "future interest" in the funds of the obligor that happen to lie within the United States, there would be a loophole in the absolute immunity of a foreign state's property outside the United States.[4] Yet, that is precisely what happened in this case. Indeed, this case is especially egregious because it concerns an obligation owed by a foreign sovereign under its laws to one of its agencies or instrumentalities within the sovereign's own borders. Significantly, the choice of law rule here must safeguard federal interests, rather than federal preemption of state law, because the FSIA neither provides the choice of law rule a court is to use in deciding susceptibility to execution nor defines "property in the United States."

Because of the potential for conflict between federal interests and state rules—a conflict presented by the Court of Appeals's decision here—a federal common law rule is required to determine what "property" is "in the United States" for purposes of execution under the FSIA. Foreign-

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[4] Such a result could also conflict with the act of state doctrine. In this case, the Court of Appeals's execution on Pertamina's "future interest" in the restrained funds based on Pertamina's right to receive the Retention Fee in Indonesia amounted to an injunction to the Republic of Indonesia to pay Pertamina the Retention Fee in the United States rather than in Indonesia. But the Republic's decision whether to pay the Retention Fee *at all* would be an act or omission that under the act of state doctrine would not be adjudicated by a U.S. court. *Sabbatino*, 376 U.S. at 436-37 (holding that an act by a foreign sovereign within its own borders is unreviewable in a U.S. court, and that title acquired by such act is equally unreviewable even if the property enters the United States).

state immunity and foreign relations are areas where this Court has carved out niches for the creation of federal common law. *Atherton v. FDIC*, 519 U.S. 213, 225-26 (1997) (recognizing as one of the "few and restricted instances in which this Court has created a federal common law[,] . . . relationships with other countries") (citing *Sabbatino*, 376 U.S. at 425) (citation and internal quotation marks omitted); *Bancec*, 462 U.S. at 622 n.11 (rejecting New York choice of law and substantive law in favor of federal common law because of the need for uniformity under the FSIA); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."); *Sabbatino*, 376 U.S. at 425-26 ("[R]ules of international law should not be left to divergent and perhaps parochial state interpretations. . . . [T]here are enclaves of federal judge-made law which bind the States.").

If the Court of Appeals had applied a federal common law choice of law rule, it would have also applied federal common law instead of New York law as the substantive rule of decision, as did the *Bancec* court. In doing so, the Court of Appeals would not have held that any part of the restrained funds was subject to execution as Pertamina's "future interest" in the Retention Fee, because unlike the New York rule of decision, a federal common law rule of decision would have taken into account the FSIA's requirement that the property to be attached must be "in the United States," 28 U.S.C. §§ 1609, 1610, thereby giving effect to the extraterritoriality of both Pertamina's interest in the Retention Fee and the Republic's corresponding obligation to pay it, both of which arise in Indonesia solely under Indonesian law.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT CONCERNING JUDICIAL PRESUMPTIONS THAT FOREIGN LAW IS SIMILAR TO THE FORUM'S LAW

A. Increasingly, federal courts must interpret or apply foreign law under Rule 44.1 of the Federal Rules of Civil Procedure, which provides that a court's determination of foreign law "shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.[5] Some courts determine foreign law by conducting independent research and analysis of that law while others do not. *Compare Twohy v. First Nat'l Bank of Chi.*, 758 F.2d 1185, 1193 (7th Cir. 1985) ("In determining these questions of law, both trial and appellate courts are urged to research and analyze foreign law independently"), *with Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir. 1988) ("By their silence, the litigants' consent to having their dispute resolved according to the law of the forum. This arrangement is not unwelcome from the court's perspective because it is spared a complicated international choice-of-law problem and can apply law with which it is familiar."); *see generally* John G. Sprankling & George K. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 Stan. J. Int'l L. 3, 82-84 (1983) (discussing the varying approaches to determining foreign law by federal courts). Sometimes courts simply presume that the foreign law is the same as or analogous to the forum's law. *See* Edwin P. Carpenter, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 Washburn L.J. 296,

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[5] *See generally* Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581, 581 (1995); Doug M. Keller, *Interpreting Foreign Law Through An Erie Lens: A Critical Look at* United States v. McNab, 40 Tex. Int'l L. J. 157, 158 (2004).

298 & n.12 (1971) (citing cases); Sprankling & Lanyi, *Pleading and Proof of Foreign Law in American Courts*, *supra*, at 83 ("A number of courts politely listen to the conflicting testimony of experts and then ignore the experts' analyses of the foreign law. . . . [S]ome courts entirely bypass the conflict by avoiding discussion about the substance of foreign law and instead rely on domestic law. Apparently, the unspoken rationale for this practice is a belief that domestic law is applicable by analogy."); Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 Mich. J. Int'l L. 37, 61-62 (1997).

B. The Court of Appeals in this case determined ownership of the Refinery Revenues based on a presumption that the applicable Indonesian law functioned analogously to a guarantee under U.S. law and without any analysis of the underlying Indonesian law.

Following the choice of law analysis described in Point I above, the Court of Appeals referred to New York law as the source of Pertamina's presumptive ownership of the Refinery Revenues, holding that "'this presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in a manner of a trustee.'" Pet. App. 71a (quoting *Pertamina I*, 313 F.3d at 86 (citing New York cases)). It then looked to "'Indonesian law uniquely applicable'" to establish the relationship between Pertamina and the Republic. *Id.* (quoting *Pertamina I*, 313 F.3d at 87). In doing so, it held that "the no-profit no-loss subsidy of the BBM regime does establish that Indonesia acts like a guarantor of Pertamina's BBM operation," but "does not deprive Pertamina of control over the refinery funds," because "Pertamina is allowed to spend those funds for any purpose, such as building asphalt plants, subject only to budgetary limitations." *Id.* The Court of Appeals concluded

by holding that because "Pertamina points to no Indonesian legal directive that deems the refinery funds Indonesia's or indicates that upon their receipt, they are anything other than 'property within Pertamina's control, which only Pertamina controls," the presumption that Pertamina owns the revenues remained unrebutted. *Id.* (citation omitted).

The Court of Appeals's speculative statement that under the BBM regime "Indonesia acts like a guarantor" has no basis at all in Indonesian law and is a presumption by the court that the rights and obligations under U.S. law of a guarantor are analogous to Indonesia's rights and obligations under Indonesian law vis-à-vis the Refinery Revenues.[6] Under Indonesian law Pertamina has rights of control and use of the Refinery Revenues, but nonetheless is not the owner of those funds. Correspondingly, Indonesia does not lose its ownership rights in the funds by virtue of allowing Pertamina to use them for purposes of maintaining BBM production and any other purpose within Pertamina's budget authority. Rather than being "like a guarantor" Indonesia still remains the owner of those funds under Indonesian law because it has unfettered dominion over them, including the right to their disposal. Had the Court of Appeals conducted an analysis of Indonesian law on its own terms, it would have ascertained concepts of divided ownership rights and property use in Indonesian law that do not have exact equivalents in U.S.

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[6] The district court made similar presumptions based on the law of "the civilized world" in determining categorically that judgments can be enforced against Pertamina's bank accounts. Pet. App. 47a-48a ("Indonesia has a [sic] law system, the same as the rest of the civilized world. . . . If Pertamina refuses to pay, that party can enforce the judgment by levying on property of Pertamina including bank accounts. This is of course in accordance with legal systems throughout the civilized world and Indonesia is no exception").

law.

C. Under Indonesian law, both Pertamina and the Republic have ownership rights with respect to the Refinery Revenues. Pertamina's ownership right, however, is a right *to* the property because it is the holder or possessor of the Refinery Revenues and uses them on behalf of the Republic. Pertamina's ownership right is known as "Bezitter" under Indonesian law. In contrast, the Republic has an ownership right *in* the property because it owns the Refinery Revenues by virtue of its dominion over all of Indonesia's natural resources and their exploitation for the benefit of the Indonesian people. The Republic's ownership right is known as "Eigendomsrecht" under Indonesian law and is a superior ownership right to Pertamina's.[7]

These principles of dual ownership in property have their root in medieval feudal law that survived into German and Dutch law during the Reformation and later was transported to Indonesia via the Dutch colonization of that country. The feudal law developed concepts of dual ownership rights known as *dominium directum* (direct ownership) and *dominimum utile* (beneficial ownership) in conjunction with clarifying the property rights of tenant vassals and superior lords (and of superior lords and kings).[8] During the

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[7] The principles of Bezitter and Eigendomsrecht were addressed in the proceedings below by the Republic's Indonesian legal expert, Dr. Sudargo Gautama, and were acknowledged by KBC's expert—albeit disagreeing that Pertamina had the rights of Bezitter. The district court and Court of Appeals ignored the principles.

[8] Robert Feenstra, *Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, in New Perspectives in the Roman Law of Property 111, 112-13 (P. Birks ed. 1989) ("Although in principle a vassal held land only by virtue of his relationship with the lord, many vassals acted as though they were in fact owners. To the Glossators [of Justinian's Code] .

Reformation, Sixteenth Century German legal scholarship retained the concepts of a full ownership right and a beneficial ownership right in property, calling *dominium directum* and *dominimum utile*, respectively, "Eigentum" (one's own) and Besitzrechte (possessory rights).[9] Grotius's *Jurisprudence of Holland* contained similar concepts, and went further by distinguishing "Eigendom" into complete and incomplete ownership.[10] For practical purposes in order to distinguish between the two ownerships, the term owner was reserved for the one having "the greater part of the rights of ownership," such as "the person who receives the rent and who has the right of reversion . . . and not the tenant who nevertheless derives the greatest profit from the land."[11] The right to the lesser part included beneficial ownership rights, i.e., *domaine utile*.[12]

Pertamina has such lesser ownership rights (i.e.,

. . he could indeed be regarded as a kind of owner"); Harold J. Berman, *Law and Revolution, II* 168 (2003).

[9] Berman, *Law and Revolution, II, supra*, at 170 ("Ownership rights *in* a thing (*jus in re*) included . . . not only full ownership (*dominium directum*) but also beneficial ownership (*dominium utile*), including the right to possess and enjoy the fruits of the land or goods of another"); Ernst Meynial, *Notes sur la formation de la théorie du domaine divise (domaine direct et domaine utile), du XII au XIV siècle dans les romanistes*, in 2 Mélanges Fitting 413 (Meynial ed. 1908) (discussing the collaboration of Roman and Germanic law in the divided domain concept).

[10] Feenstra, *Dominium and ius in re aliena*, *supra*, at 118-19 (citing Grotius's work).

[11] *Id.* at 119-20 (quoting Grotius's work).

[12] *Id.* at 121. Grotius defined *dominium utile* as "a right of use and enjoyment," which "is a right to take the fruits of another's property without impairing the property itself." Hugo Grotius, I *Jurisprudence of Holland* 235 (Robert W. Lee tr. 1977).

possessory rights or Bezitter) in the Refinery Revenues, as it is authorized through statutes, regulations, ministerial decrees and directives to possess, use, and profit from them.[13] But its possession, use, and profit are all for the benefit of the Republic with respect to its delegated task of supplying BBM to the Indonesian people at below-market prices. The Republic maintains the upper ownership right (i.e., Eigendomsrecht) as it is the one vesting Pertamina with rights in the Refinery Revenues and the one having dominion not only over the revenues but also the natural resources from which these revenues are derived. Moreover, the Republic has the right to dispose of the property in any way it deems fit, as evidenced by the statutes, regulations, decrees and directives that authorize and delegate Pertamina's budget authority, use of and profit from the revenues.

Had the Court of Appeals conducted an independent examination of the principles underlying the concepts of Bezitter and Eigendomsrecht, rather than presuming that the Republic's relationship vis-à-vis Pertamina was the same as that of a guarantor of Pertamina's BBM operations under

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[13] These laws, all discussed by the Ministry's expert on Indonesian law, Dr. Gautama, include: Article 3 of Joint Ministry Decree No. 2/1967 and the elucidation thereto (requiring Pertamina's predecessor to prepare an annual BBM budget and explaining that Pertamina carries on the BBM operations on behalf of the Republic); Law No. 8/1971, Article 13(b) and Government Regulation 31/2003, Art. 6(1) (delegating to Pertamina the authority to supply BBM at subsidized prices); Article 4(2) of Presidential Instruction 12 of 1975 and Article 4(2) of Government Regulation 41/1982 (defining as "State Income" the monetary value of the Republic's share of crude oil from PSCs that is used as feedstock in refineries); Pertamina Board of Commissioners' Directives N. 105/K/DKPP/1980 and No. 78/K/DKPP/2001 (Government Commissioners' directives establishing that revenues from non-BBM exports are used to reduce Republic's subsidy and establishing amount of Pertamina's fees and commissions).

U.S. law, the court would have determined that Pertamina's control over the revenues and its use of the revenues to build asphalt plants or for any other purpose within its budget authority, Pet. App. 71a, was not determinative of ownership of the revenues because such control and use are consistent with a possessory ownership right in the revenues under Indonesian law. Such an examination and determination of the applicable foreign law would have been respectful of international comity and a more consistent standard to apply in determining foreign law under Rule 44.1 of the Federal Rules of Civil Procedure.

The Court should settle the issue that in the absence of an independent examination of the applicable foreign law, it is an error of law to presume that foreign law is similar to forum law. As noted by one commentator, a result of substituting forum law for foreign law is "the embracing of a parochial view that all law is like our law (or should be)—a view out of step with the global nature of transactions and disputes." Louise E. Teitz, *From the Courthouse in Tobago to the Internet: the Increasing Need to Prove Foreign Law in U.S. Courts*, 34 J. Mar. L. & Com. 97, 98 (2003).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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June 7, 2006

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302 (TPG)

In the Matter Of An Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("Pertamina"),
Respondent.

FINAL ORDER

1. On February 22, 2002, petitioner Karaha Bodas Company, L.L.C. ("KBC") registered in this District a final judgement against respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") that was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment confirmed the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Others*, YD/IS 60 319, pursuant to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208, which awarded KBC $261,166,654.92, plus interest from January 1, 2001. Pertamina is an Indonesian state-owned oil and gas enterprise.

2. On February 22, 2002, this Court issued on an *ex parte* basis two Writs of Execution and Orders to Show Cause, pursuant to which the Court: (a) permitted KBC to issue restraining notices (the "Restraining Notices"), which

KBC served pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of New York Civil Practice Law and Rules ("CPLR") upon the banks listed in paragraph 3 (the "Garnishee Banks"), which Garnishee Banks KBC alleged held funds owed to Pertamina or in which Pertamina had an interest; (b) authorized certain discovery; and c) ordered Pertamina to show cause why KBC could not execute upon any property of Pertamina within this jurisdiction in satisfaction of the judgement.

3. KBC served the restraining notices upon the following garnishee banks in New York:

Bank of America Corporation f/k/a Bank International
Bank of America National Association
Bank of America Securities
Bank of New York
Chase Securities, Inc.
Dai-Ichi Kangyo Bank, Ltd.
JP Morgan Chase Bank
Bank Indonesia
Bank of Montreal Trust Company
Bank of Taiwan New York Agency
Bank Rakyat Indonesia
PT Bank Central Asia (Persero)
PT Bank Negara Indonesia (Persero) Tbk
PT Bank Mandiri (Persero)

4. On March 25, 2002, the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeared to contest ownership of the restrained assets, and to that end filed a motion to quash (the "Motion to Quash") the Restraining Notices, the Writs of Execution and Orders to Show Cause, and the subpoenas issued by KBC seeking discovery from the Garnishee Banks. The Motion to Quash was fully briefed.

5. On March 23, 2002, Pertamina filed an Opposition to KBC's Writs of Execution and Orders to Show Cause. KBC filed a reply on April 2, 2002.

6. On April 5, 2002 this Court conducted a hearing on: (i) the Order to Show Cause, and (ii) the Ministry's Motion to Quash.

7. For the reasons stated in open court on April 5, 2002, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

A. Trust Accounts Holding Pertamina's Production Sharing Percentage of Gas Sales Revenues

8. The trust accounts listed in this paragraph at the identified Garnishee Bank below: (a) are established pursuant to various Trustee and Paying Agent Agreement; (b) relate to natural gas production projects in Indonesia conducted pursuant to Production Sharing Contracts; (c) contain revenues from natural gas, liquefied natural gas ("LNG") and liquid petroleum gas ("LPG") sales by Pertamina; and (d) are held in Pertamina's name and are subject to the Retention Fee as described in paragraph 12. These trust accounts are restrained under the Restraining Notices:

Trust accounts at Garnishee Bank of America, N.A.:

ARUN II Trust
ARUN III Trust
Bontang Excess Sales MCGC Trust
Bontang Excess Sales AQP Trust
Bontang Excess Sales Korea II Trust
Bontang Excess Sales KCO Trust
Bontang LPG PKG V Trust
Bontang LPG PKG VII Trust
Bontang II Trust
Bontang III Trust
Bontang IV Trust
Bontang V Trust
Bontang VI Trust
East Java Pipeline (PSC Revenue) Trust
ONWJ Trust

9. Each Trust identified in paragraph 8 above receives the sales proceeds arising out of specific Production Sharing Contracts; these sales proceeds are deposited by buyers into the appropriate trust fund account as required by contract. Pursuant to a specific Trustee and Paying Agent Agreement, the Trustee first makes payments and accruals for debt service, reserves, and other expenses and costs. The excess amount left in each general trust account after these payments are made (the "Net Operating Income") is distributed by the Trustee in accordance with the Production Sharing Percentages specified in the Production Sharing Contracts for each producer, a term defined for the Trustee and Paying Agent Agreements to include both Pertamina and the foreign contractors. A Trustee deposits each producer's share of the Net Operating Income in that producer's trust sub-account. Pertamina, as a producer, receives a share of each Production Sharing Contract.

10. The only trust and payment accounts and sub-accounts restrained are those maintained in Pertamina's name or for Pertamina's benefit.

11. Article 5(2) of Indonesian Government Regulation 41/1982 provides that the difference between the share nominally received by Pertamina according to each Production Sharing Contract and a Retention Fee payable to Pertamina as intended in Article 5(1) "shall be the Government's portion." (the "Government's Portion")

12. Article 5(1) of Indonesian Government Regulation 41/1982 provides that Pertamina receives a retention fee out of the proceeds of each Production Sharing Contract. The Retention Fee is equal to five percent (5%) of the Net Operating Income that is generated from each such contract and that is paid to Pertamina and its production sharing partners (the "Retention Fee").

13. The Court finds that Pertamina has a property right in the trust accounts identified in paragraph 8 above, to the extent of its five percent (5%) Retention Fee, which can be executed upon in the manner allowed under New York C.P.L.R. 5222(b).

14. The Court finds that the Government of Indonesia does not have an ownership interest in any of the five percent (5%) Retention Fee, and that the provisions of Indonesian law providing for a tax and a dividend to be paid out of the five percent (5%) Retention Fee do not confer an ownership interest on the Government of Indonesia.

15. The Court finds that the Government of Indonesia has a property right in the "Government's Portion" under Article 5(2) of Government Regulation No. 41/1982 with respect to those funds held in Pertamina's name in the trust accounts identified in paragraph 8 above, and therefore, is entitled to these funds. The trust accounts cannot be executed upon to the extent of the Government's Portion.

16. Accordingly, the Ministry's Motion to Quash is GRANTED and KBC's Motion is DENIED with regard to the trust accounts listed in paragraph 8, as to the Government's Portion. KBC's Motion is GRANTED and the Ministry's Motion to Quash is DENIED only as to the amount of Pertamina's Retention Fee with regard to the trusts listed in paragraph 8.

17. In addition, to the trust accounts listed in paragraph 8, restraints have been placed on the following accounts:

Trust Accounts at Garnishee Bank of America, N.A.:

BLRE Trust
Cilacap Trust
Corridor Trust
East Java Pipeline (Throughput Fee) Trust
KMI Trust
South Sumatra Trust
West Natuna Trust

Trust Accounts at Garnishee Bank of New York:

Exor I Trust
MUSI II Trust

18. The Court finds that the present record is insufficient to determine whether KBC is entitled to execution against these accounts. These accounts, to some extent, raise individual factual issues and, in any event, do not involve the same uniform questions of law raised with respect to the trust accounts listed in paragraph 8.

19. The Court certifies that the order contained in paragraphs 8-16 involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

20. The order contained in paragraphs 8-16 is stayed pending the conclusion of proceedings in the Court of Appeals.

Dated: New York, New York
April 24, 2002

/s/ Thomas P. Griesa
United States District Court Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

Docket Nos. 02-7513(L), 02-7515(CON), 02-7547(XAP), 02-7715(CON), 02-7717(CON), 02-7723(XAP).

KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("Pertamina"),
Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Appellant-Cross-Appellee.

Argued: Aug. 7, 2002.
Decided: Dec. 10, 2002.

Before: CALABRESI, POOLER, and SACK, Circuit Judges.

SACK, Circuit Judge.

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-appellant the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeal from an April 26, 2002, memorandum and order issued by the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) insofar as it permits petitioner-appellee Karaha Bodas Com-

pany, L.L.C. ("KBC") to execute against a portion of the funds in several Bank of America trust accounts that are listed in the district court's order. KBC appeals the same order insofar as it denies KBC's motion to execute against the remainder of the same funds. The question on appeal concerns the ownership of the funds in the Bank of America trust accounts, which derive from sales of Indonesian liquefied natural gas ("LNG"), and whether such funds can be attached under New York law, as applicable pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). KBC's claim rests on the allegation that all such funds belong to Pertamina, and on the alternative theory that KBC was entitled to rely on Pertamina's ownership thereof. Pertamina and the Ministry respond that under Indonesian law, the funds belong to the Republic of Indonesia.

We agree with the district court's disposition of the ownership question. The district court correctly analyzed the Indonesian law that controls the ownership of the funds and correctly concluded that most, but not all, of the funds belonged to Indonesia. Accordingly, we affirm.

BACKGROUND

The Parties

KBC describes itself as "a Cayman Islands limited liability company formed by two American power companies and other investors, and is 90%-owned by U.S. investors." Petitioner-Appellee's Br. at 2. The Ministry, acting on behalf of the Government of the Republic of Indonesia, is a "foreign state" within the meaning of the FSIA, 28 U.S.C. § 1603(a).[1] Pertamina is an oil and gas company owned and controlled by

[1] 28 U.S.C. § 1603(a) defines "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* None of the parties dispute that the Ministry is a foreign state for the purposes of the FSIA.

the Republic of Indonesia. Pertamina engages in oil and gas exploration, extraction, processing, marketing, transportation, and distribution. The 1971 statute creating Pertamina, Law 8 of 1971, explains that the company's goals are "to develop and carry out the exploitation of oil and natural gas . . . for the maximum prosperity of the People and the State.[2] Law of the Republic of Indonesia Number 8 Year 1971, Art. 5. The Indonesian government owns all of Pertamina's equity and controls a supervisory board, constituted pursuant to Law 8, that supervises Pertamina's management.[3] Pertamina, for purposes of the FSIA, is therefore "an agency or instrumentality of a foreign state."[4] 28 U.S.C. § 1603.

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[2] Pursuant to Government Regulation Number 27 of 1968, Pertamina was initially established as the National Oil and Gas Mining State Enterprise, but was reorganized under Law 8. Prior to Law 8's issuance, the Republic of Indonesia had authorized different state enterprises to extract and sell natural gas and oil pursuant to Articles 5 and 6, of Law 44 of 1960.

[3] Pertamina is currently in a state of legal flux because of changes in its organic statute. Under Law 22 of 2001, Pertamina must, within two years, change "from a state enterprise to a state-owned limited liability company." Decl. of Sudargo Gautama ¶ 37. Law 22 repeals Law 8 and Law 44, but leaves in place implementing regulations that supplement those laws. Draft Law of the Republic of Indonesia Number 22 of 2001, Art. 66. But "Law 22/2001 has not yet been implemented with respect to Pertamina." Supp. Decl. of Sudargo Gautama ¶ 6. The parties' experts on Indonesian law apparently agree that this case should be decided according to the pre-Law 22 regulations. *See* Decl. of Sudargo Gautama ¶ 36; Decl. of Robert N. Hornick ¶ 14.

[4] 28 U.S.C. § 1603 includes any entity in which a government has "a majority of . . . shares or other ownership interest." 28 U.S.C. § 1603(b). "A typical governmental instrumentality . . . is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Pertamina satisfies this description.

The KBC-Pertamina Geothermal Energy Contracts

In November 1994, KBC executed two contracts—a "Joint Operation Contract" and an "Energy Sales Contract"—with Pertamina and another Indonesian state-owned entity, Persero, for the development of geothermal energy extraction facilities in the Karaha area of West Java. In these contracts, Pertamina waived "any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may acquire in the future." *See, e.g.*, Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, § 15.8(c). Pertamina also "consent[ed) in respect of the enforcement of any judgment against it." Karaha Geothermal Joint Operation Contract, Art. 21.7(d); Karaha Geothermal Energy Sales Contract, § 15.8(d). The contracts did not contain any representations about KBC's right to attach particular assets in case of default or breach. And KBC points to no evidence, either within the contracts' text or in pre-contract negotiations, that Pertamina made any representations regarding its ownership of LNG revenues or its obligation to provide a security interest. Each contract also contained a choice of law clause specifying Indonesian law and provided that disputes would be resolved by an international arbitral tribunal constituted under the Arbitral Rules of the United Nations Commission on International Trade Law.

In 1997 and 1998, Indonesia experienced a fiscal crisis that induced political instability and the eventual collapse, on May 21, 1998, of the regime led by President Mohamed Suharto. In the course of the crisis, on September 20, 1997, the KBC projects were suspended by an Indonesian "Presidential Decree," along with approximately seventy-four other government-related infrastructure projects. In November 1997, another decree permitted some of the projects to proceed again, but in January 1998, a third decree terminated the KBC projects once more, despite lobbying by KBC and Pertamina, among others.

Arbitration on the Geothermal Energy Contracts

On April 30, 1998, KBC commenced arbitration in Geneva, Switzerland, alleging that the project's termination constituted a breach of the geothermal energy contracts. On September 30, 1999, the Swiss arbitral panel issued a preliminary ruling rejecting Pertamina's objections to arbitration and concluding that all of KBC's claims could be addressed in a unitary proceeding. The arbitral panel also rejected KBC's motion to treat the Republic of Indonesia as a party to the geothermal energy contracts.

In a December 18, 2000, award, the arbitral panel concluded that KBC had been "prevented from pursuing the performance of the binding contracts that it relie[d] upon for reasons beyond its control . . . [and] should not bear the consequences thereof." Final Award in an Arbitration Procedure Between KBC and Pertamina and Persero, at 31. The arbitral panel awarded KBC damages for lost investments of $111.1 million and lost profits of $150 million plus interest and fees. *Id.* at 35-47. On February 1, 2001, Pertamina filed an appeal in the Supreme Court of Switzerland. The appeal was dismissed on April 24, 2002. Pertamina also asked an Indonesian court to enjoin enforcement and annul the award.[5]

Proceedings in the Southern District of Texas

KBC sought enforcement of the award in the United States District Court for the Southern District of Texas pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§ 201-

[5] Pertamina filed suit on March 14, 2002, in Indonesia requesting both annulment of the arbitral award and an injunction preventing KBC from enforcing the arbitral award. A court in Jakarta, Indonesia enjoined KBC from taking action to enforce the judgment anywhere in the world, threatening a $500,000 per diem fine for violations.

208. Rejecting Pertamina's numerous asserted defenses, the district court (Nancy Atlas, *Judge*) entered final judgment on December 4, 2001, in the amount of $261.1 million and interest at the rate of four percent per annum for KBC.[6] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp.2d 936, 957 (S.D.Tex. 2001). Pertamina's appeal of that order is pending before the Fifth Circuit.

KBC, in an attempt to enforce the judgment, then moved before the Southern District of Texas to register that judgment in other judicial districts within the United States pursuant to 28 U.S.C. § 1963.[7] KBC filed with the court, among other papers, an affidavit alleging that Pertamina had assets in seven New York banks. Judge Atlas held that KBC had fulfilled the requirement of 28 U.S.C. § 1610(c), that a party seeking to attach a foreign sovereign's property refrain for "a reasonable period of time" after judgment, and permitted KBC to register the judgment in Delaware, New York, and California federal district courts. On February 15, 2002, Judge Atlas also granted KBC's motion for an *ex parte* writ of garnishment against Bank of America.

Proceedings in the Southern District of New York

On February 22, 2002, KBC presented the December 4, 2001, Southern District of Texas judgment for registration to the United States District Court for the Southern District of New York. The same day, the latter court issued an *ex parte* writ of execution and order to show cause pursuant to Fed R.

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[6] In response to the Indonesian order annulling the arbitral award, *see supra* note 5, Judge Atlas issued her own injunction barring Pertamina from requesting enforcement of the Indonesian order. Tr. of March 29, 2002 Hearing Before Judge Atlas, at 5-6. Judge Atlas's injunction has been appealed to the Fifth Circuit.

[7] 28 U.S.C. § 1963 permits registration of a judgment "when ordered by the court that entered the judgment for good cause shown." *Id.*

Civ. P. 69(a) and 28 U.S.C. § 1610(c) "author[izing KBC] to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date, in total to the sum of $261,166,654.92 plus interest from January 1, 2001." Pursuant to Fed.R.Civ.P. 69(a) and N.Y. C.P.L.R. § 5222(b),[8] the district court issued restraining notices, which KBC subsequently served upon Bank of America and several other banks.

The Nature of the Disputed Funds

This appeal concerns fifteen trust accounts at Bank of America.[9] These accounts contain funds from the sale of LNG extracted in Indonesia under arrangements called Production Sharing Contracts ("PSCs"), which are governed by Indonesian law.

As mandated by Indonesian law, Pertamina enters into PSCs with private oil and gas contractors for the extraction of Indonesian crude oil and natural gas.[10] The Republic of Indonesia is not party to the PSCs, but it must approve them. Under a PSC, the private contractor (the "PSC contractor") is responsible for all exploration, development, extraction, production, transportation, and marketing operations related to a

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[8] Rule 69(a) provides, "Process to enforce a judgment for the payment of money shall be a writ of execution. . . . The procedure on execution . . . shall be in accordance with 'the practice and procedure of the state in which the district court is held. . . .'" Fed.R.Civ.P. 69(a).

[9] The district court's analysis (and hence this appeal) does not concern trusts "containing non-PSC Operating Income: the Musi II, Exor 1, Cilacap and the throughput fee portion of the East Java Pipeline trusts." Final Order ¶ 17. The district court concluded that the record was "insufficient to determine whether KBC is entitled to execution against these accounts." Id. ¶ 18.

[10] Geothermal energy contracts and PSCs are different. Pertamina entered into geothermal energy contracts with KBC for the purposes of developing extraction facilities. Pertamina entered into PSCs with private oil and gas contractors for the purposes of extracting oil and natural gas.

specified geographic area under Pertamina's management. As part of their compensation, PSC contractors initially receive a share of the oil or natural gas after extraction. They then transfer the remaining oil or gas to Pertamina.

PSC contractors must deliver the extracted natural gas to Pertamina, which then transports the gas for domestic sale or for conversion into LNG at liquefaction plants. Pertamina sells LNG to foreign buyers pursuant to long-term sales contracts that contain choice of law clauses specifying New York law as governing the contracts. LNG sales were the "largest single source of Pertamina sales revenue" in the last nine months of 2000. Decl. of Robert N. Hornick ¶ 22. Buyers of LNG remit payment to specified trust accounts in New York. In all such LNG sales, Pertamina, in its own name, purports to transfer title to the LNG, or title to the refined product, to the buyer. Pertamina warrants that it has "good title to the [LNG], free of all liens and encumbrances of any kind." *Id.* ¶ 23(b). Revenues from sales of natural gas are also sent to trusts in New York. The trusts "distribute the proceeds in accordance with trust agreements and ultimately to the [PSC contractor] in accordance with their respective [PSCs]." Decl. of Sahala L. Gaol ¶ 9. However natural gas is sold, and whether or not it is liquefied, proceeds from sales are first paid into trust accounts such as those at Bank of America.

Bank of America is the trustee of the accounts deposited with it. Before making any allocations or distributions, it credits all LNG revenues from a particular project, or subpart of a project, to a general account. The general accounts and other subaccounts are operated pursuant to contractual arrangements known as Trustee and Paying Agent Agreements ("TPAA") that define the trustee's obligations. TPAAs are signed by Bank of America, Pertamina, and relevant PSC contractors, but only Pertamina has authority to direct payment. *See, e.g.*, Bontang V Trustee and Paying Agent Agreement of July 1, 1995, Art. 3.5(b)(i). Like the LNG sales

contracts, the TPAAs also contain choice of law clauses specifying New York law as governing. *Id.* Art. 13.6.

Before any distribution can be made to Pertamina or the PSC Contractor, the TPAAs specify that production expenses—which include debt service payments, production costs, and trustee expenses—are paid first. *Id.* Art. 3.3-3.4. After production payments are made, the "PSC Revenue" or the "Net Operating Income" remains in the general trust account. This remainder is essentially the net profit from the PSC, after costs have been deducted and debts have been serviced.

The PSC Revenue is then divided between Pertamina and the PSC Contractor for a particular project in contractually specified portions known as "Production Sharing Percentages." These payments are made to separate subaccounts or separate line accounts within the general trust account. *Id.* at 8. The funds at issue in this appeal are, thus, Pertamina's Production Sharing Percentage or, in the terms used in the contracts, Pertamina's share of the Net Operating Income.

Pertamina's Production Sharing Percentage is transferred directly to the Republic of Indonesia. Indeed, "Pertamina at the direction of the Indonesian Government, has issued standing instructions to the Trustee to pay its Production Sharing Percentage to an account of the Government of Indonesia at Bank Indonesia." Decl. of Ainun Na'im ¶ 23. Evidence submitted by the Ministry and Pertamina suggests that twenty percent of the Indonesian national budget derives from oil and natural gas revenues. *See* Decl. of Sahala L. Gaol ¶ 11. The funds are typically used to maintain Indonesia's foreign exchange reserves, and thus to service Indonesia's foreign debt. *Id.* ¶ 12.

The LNG Security Arrangement

One noteworthy feature of the trust arrangements is the mechanism whereby Pertamina borrows funds for the con-

struction of natural gas liquefaction facilities, without requiring a counter-party lender to depend on Pertamina's willingness or ability to assure repayment. For example, the record contains 1997 loan agreements for funds to create a natural gas liquefaction facility. One loan agreement explains that "certain proceeds of liquefied natural gas" that are held in trust accounts at Bank of America are the "*sole* source of repayment." Bontang VI Loan Agreement of March 4, 1997, at 2 (emphasis added). A fixed percentage of gross revenues from LNG revenues in the trust accounts is therefore allocated to loan repayment, and only after loan repayments are complete can other disbursements be made. Through this device, the LNG revenue stream structure protects lenders' interests.

The District Court Opinion and Order

On March 23, 2002, Pertamina filed papers opposing KBC's order to show cause for a writ of execution on the ground that none of the restrained accounts contained property owned by Pertamina. The previous day, the Ministry, purporting to be a "Non-Party with Interest," had also filed a memorandum of law arguing that the restraining notices and writs of execution should be quashed.

Following supplementary briefing, the district court held a non-evidentiary hearing on April 5, 2002, and delivered an oral decision on the ownership and disposition of the restrained funds in the trust accounts. According to the district court, "the ultimate ownership of the money . . . does not have to appear in the trustee and paying agent agreement," so the TPAAs' designation of Pertamina as trust owner was not dispositive. Tr. of April 5, 2002 Hearing, at 10-11. Nor could Pertamina's practice of paying the funds directly to the Republic of Indonesia dispose of the question. *Id.* at 51. The district court reasoned instead that the ownership of the LNG revenues in Pertamina's subaccount was a matter of Indonesian law, which explicitly allocated ownership rights in the

funds. *Id.* at 80-81. Canvassing Indonesian law, the court concluded that Article 5(2) of Government Regulation 41 of 1982 vested ownership of all funds, except for a portion called the "Retention," in the Republic of Indonesia. "What is decisive on the question of property rights is a provision of Indonesian law which became effective in 1982 and article 5 of that law." *Id.* at 81. It allocated Pertamina's Production Sharing Percentage, less five percent of the Net Operating Income (which is designated Pertamina's "Retention"), to the Republic of Indonesia. This 1982 law, noted the district court, distinguished the Republic of Indonesia's interest from Pertamina's tax and dividend obligations. *Id.* at 83. Therefore, the only portion of the funds that KBC could attach was the five-percent portion—i.e., the Retention—which belonged to Pertamina. The district court memorialized its decision in a written order on April 26, 2002.

This Appeal

Pertamina and the Ministry appeal the district court's order and challenge its conclusion that the Retention is owned by Pertamina. The Ministry also contends that once the district court had concluded that the remaining funds belonged to the Republic of Indonesia, sovereign immunity foreclosed any further restraint of those funds. KBC appeals the portion of the order that is based on the district court's conclusion that KBC could not execute against the entirety of Pertamina's Production Sharing Percentage.

On June 18, 2002, we denied KBC's motion to dismiss the appeal, and permitted both the Ministry and Pertamina to appeal pursuant to either 28 U.S.C. § 1292(b), the collateral order doctrine, or both. We observed that the collateral order doctrine might apply because this appeal raised an issue of sovereign immunity, but expressly reserved judgment on the jurisdictional issues. Finally, we modified the stay to apply only to those funds that would be necessary and sufficient to satisfy a judgment.

DISCUSSION

I. Standard of Review

In a proceeding under the FSIA, "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." *Filetech S.A v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir.1998). *De novo* review is appropriate even where the district court supplements the complaint with "undisputed facts from the record," as the court did here. *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 138 (2d Cir.2001) (citation and quotation marks omitted).

"Likewise, pursuant to Fed. R.Civ.P. 44.1, a court's determination of foreign law is treated as a question of law, which is subject to *de novo* review." *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir.1998). Finally, the district court's choice of law determination is also subject to *de novo* review. *Id.*

II. Subject Matter Jurisdiction

Prior to consideration of the appeal's substance, we address two threshold subject matter jurisdiction questions: whether our statutory subject matter jurisdiction properly obtains and whether the Ministry is a proper party on appeal.

A. Statutory Appellate Jurisdiction

Ordinarily, appeals are permitted only from "final decisions of the district courts." 28 U.S.C. § 1291. One exception to this rule, contained in 28 U.S.C. § 1292(b), however, permits appellate jurisdiction over interlocutory civil orders "[w]hen a district judge . . . [is] of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and so certifies in a written order. 28 U.S.C. § 1292(b). Upon entry of such an

order, the court of appeals has the discretion to accept or decline jurisdiction. *Id.*

On April 24, 2002, the district court certified this case for appeal under 28 U.S.C. § 1292(b). Final Order of April 24, 2002, at 6. The prerequisites for appellate jurisdiction are satisfied. First, the interaction of federal, New York, and Indonesian law poses "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Second, our review of the district court's order will advance the litigation by resolving the disposition of funds that allegedly belong to a foreign sovereign. Pursuant to our discretion under 28 U.S.C. § 1292(b), we therefore accept jurisdiction to hear this appeal.[11]

B. The Ministry as Appellant

KBC did not name the Ministry as a party in its action to enforce the Swiss arbitral award in the Southern District of Texas. *KBC*, 190 F.Supp.2d at 939. Judge Atlas's final order names only Pertamina as a respondent. And the order certified in the Southern District of New York on February 22, 2002, again mentions Pertamina alone. Not until March 22, 2002, after the funds in the Bank of America trust accounts were attached, did the Ministry appear in the district court, then characterizing itself as a "Non-Party with Interest."

At first blush, the Ministry's absence from the initial proceedings and its failure to intervene pursuant to Fed. R.Civ.P. 24 seem to preclude its participation in this appeal. "[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment" *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam). But, as the Supreme Court recently made clear, the

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[11] Having accepted jurisdiction under 28 U.S.C. § 1292(b), we need not determine whether the collateral order doctrine provide an alternative vehicle to hear this appeal. *See Excimer Assocs. v. LCA Vision, Inc.*, 292 F.3d 134, 138 (2d Cir.2002) (describing the collateral order doctrine).

Ministry is indeed a "party" to the district court's judgment for present purposes, and can therefore properly appeal.

In *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 2008, 2013, 153 L.Ed.2d 27 (2002), the Court held that an unnamed member of a class could appeal a class action settlement at a fairness hearing even though he had failed to intervene earlier. The Court cautioned that "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* at 2010. To determine who may appeal, courts must ascertain whether putative appellants are "bound by the order from which they were seeking to appeal." *Id.* In *Devlin*, for instance, the appellant faced a "final decision of [a] right or claim sufficient to trigger his right to appeal." *Id.* (citation and internal punctuation omitted).

Similarly, we have long allowed appeal "when the nonparty has an interest that is affected by the trial court's judgment." *United States v. Intl Bhd. of Teamsters*, 931 F.2d 177, 183-84 (2d Cir.1991) (quoting *Hispanic Soc'y v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir.1986), *aff'd, Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)); *accord West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir.1934). "The question therefore is whether the putative appellant can identify an 'affected interest.'" *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir.1999). The Ministry alleges that the Republic of Indonesia owns the property encompassed by the garnishment order. Under Devlin, *Kaplan*, and similar cases, this constitutes an "affected interest," which entitles the Ministry to join this appeal.

III. Execution Against or Attachment of Foreign Sovereigns' Property

Attachment of a foreign state's property in the United States is governed by the FSIA. In relevant part, the FSIA provides that "the property in the United States of a foreign

state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of [the FSIA]." 28 U.S.C. § 1609. Section 1610 provides different regimes for sovereign states on the one hand, and their agencies and instrumentalities on the other. First, 28 U.S.C. § 1610(a) provides that any property of a foreign sovereign that is

> used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if . . . (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver.

Id. Second, § 1610(b), which concerns foreign states' instrumentalities, such as Pertamina, provides in relevant part that:

> any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if . . . (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver.

Id. Subsection (a) is generally thought to be narrower than subsection (b). *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252-65 (5th Cir.2002). While subsection (b) applies to *all* property of the agencies and instrumentalities of foreign states, subsection (a) applies only to the property of foreign states that is "used in commercial activity." *Id.*

In the appeal before us, sample geothermal energy contracts between Pertamina and KBC state that Pertamina "waive[s] any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may have in the future." Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, Art. 15.8(c). Pertamina, through its use of the trust funds to channel LNG revenues, engages in commerce in New York. Under 28 U.S.C. § 1610(b), Pertamina has thus waived its sovereign immunity from attachment in United States courts.[12]

A. Attachment Under the FSIA and New York Law

The FSIA states that when a foreign state is not protected by sovereign immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed.R.Civ.P. 69(a), which requires the application of local state procedures. *See Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo*, S.A., 190 F.3d 16, 20 (2d Cir.1999) (applying Rule 69(a), and hence New York law, in an FSIA action).

In the instant action, the district court is located in New York state. We therefore apply New York law to determine what assets are "subject to enforcement, and thus available to judgment creditors." *Alliance*, 190 F.3d at 20. "New York procedure for enforcement of judgments is set out in Article 52 of the Civil Practice Law and Rules. The first section of Article 52 describes the assets that New York law has made subject to enforcement, and thus available to judgment credi-

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[12] Because this is an appeal from an order executing a judgment against the property of Pertamina—as opposed to the property of the Ministry or the Republic of Indonesia—the sovereign immunity claims of the Ministry or the Republic of Indonesia are not before us.

tors." *Id.* The relevant provision, N.Y. C.P.L.R. § 5201(b), states that:

> **Property against which a money judgment may be enforced.** A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

Id. In New York, then, a party seeking to enforce a judgment "stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own." *Bass v. Bass*, 140 A.D.2d 251, 253, 528 N.Y.S.2d 558, 561 (1st Dep't 1988). Nonetheless, a party cannot "reach . . . assets in which the judgment debtor has no interest." *Id.* A determination of Pertamina's property interest in the disputed funds—i.e., whether Pertamina can "assign or transfer" any of these funds—is therefore dispositive of this appeal. N.Y. C.P.L.R. § 5201(b).

B. Ownership of the Disputed Funds

While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds. KBC argues that under New York law, Pertamina owns the Production Sharing Percentage because Pertamina controlled the allocation of the funds within the trust accounts and retained initial title to the LNG, which it sold to generate the disputed funds. KBC finds no significance in the fact that much of those funds flow to the Republic of Indonesia. In KBC's view, these funds merely represent "various royalties, taxes, and dividends" which "Pertamina is obligated to pay the Government." Decl. of Robert N. Hornick ¶ 24. KBC argues that before those obligations are met, the funds belong to Pertamina. KBC's expert also argues that Indonesian law does not vest the Re-

public of Indonesia with any ownership interest in these funds. *See id.* at ¶¶ 24-49.

Both Pertamina and the Ministry argue to the contrary that Indonesian law deprives Pertamina of all but a future property interest, limited to five percent of the Net Operating Income, while the Republic of Indonesia has the exclusive right to the rest of Pertamina's Production Sharing Percentage. They, like the district court, identify Government Regulation 41 as providing the dispositive rule of decision:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article *shall be the Government's portion.*

Government Regulation of the Republic of Indonesia Number 41 of 1982. Art. 5 (emphasis added). According to Pertamina's expert, "[t]his [provision] means that the Government owns the Percentage Share due to Pertamina under the PSC but must pay Pertamina the five percent fee," or Retention. Supp. Decl. of Sudargo Gautama ¶ 4.

Pertamina also argues that even the Retention, which equals five percent of the Net Operating Income, cannot be attached. Pertamina contends that before it transfers its Production Sharing Percentage to the Republic of Indonesia, the latter *owns* all the PSC Revenue as a result of Government Regulation 41. Only after the revenue reaches Jakarta does Pertamina receive the Retention. And even in Jakarta, Pertamina is not entitled to the entire Retention. Regulation 41, in Article 5(3), subjects the retention to a sixty percent tax. A second regulation, Government Regulation 73, then mandates

payment of a fifty percent dividend to the government. In all, Pertamina actually receives one fifth of the Retention.[13]

Resolution of this appeal requires that we determine the legal ownership of the PSC Revenues. At the threshold, we must consider which choice of law rule governs the question of ownership.

IV. Choice of Law Analysis

A. Federal or State Choice of Law Rules

"[R]ather than directing courts to apply the choice of law rules of the place of [the relevant events], the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law." *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir.1991); *accord Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir.1996) ("[T]he FSIA . . . operates as a 'pass-through' to state law principles."). In *Barkanic*, we reasoned that the FSIA "expressly embraces the goal of holding foreign states liable in the same manner and to the same extent as a private individual under like circumstances." *Barkanic*, 923 F.2d at 960 n. 3 (internal citation and quotation marks omitted). *Barkanic* suggests that New York choice of law rules govern.

The Ministry argues that *Barkanic* applies only to questions of "liability," and does not extend to questions about "the amenability of the sovereign to suit." Ministry Reply Br.

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[13] For instance, if the PSC Revenue were $100, the Pertamina's retention would be $5, or five percent. Under the terms described in Pertamina's annual reports, though, the PSC Revenue would be divided: $35 would go to the PSC contractor, and $65 would go to Pertamina in New York, then be transferred immediately to the Ministry in Jakarta. Once the $65 reached Jarkarta, Pertamina would receive $5. After taxes and dividends, however, Pertamina would only retain $1.

at 16. The latter questions, the Ministry argues, are governed by federal common law choice of law rules. *Id.* (emphasis omitted). But in *Barkanic*, we explained that in FSIA cases, we use the forum state's choice of law rules to resolve "*all* issues," except jurisdictional ones. *Barkanic*, 923 F.2d at 959, 961 (emphasis added). Determining what property Pertamina owns is not a jurisdictional question, which would require application of federal law. Jurisdiction has already been established pursuant to 28 U.S.C. § 1610(b)(1) by the contractual waiver of immunity. Like the *Barkanic* court, we now determine only the scope of recovery.[14] New York choice of law rules therefore govern our decision.

B. New York or Indonesian Property Law

Under New York law, "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. and Stolarz*, 81 N.Y.2d 219, 223, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904, 905 (1993); *accord Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998). In property disputes, if a conflict is identified, New York choice of law rules require the application of an "interests analysis," in which "the law of the jurisdiction having the greatest interest in the litigation [is] applied and [ ] the facts or contacts which obtain significance in defining

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[14] Any "resort to federal common law to fill the interstices of our federated legal system, must be warranted by overriding and compelling federal concerns." *Pescatore*, 97 F.3d at 10 (citation and internal quotation marks omitted); *accord O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (noting that "cases in which judicial creation of a special federal rule would be justified . . . are . . . few and restricted") (citation and internal quotation marks omitted). The Ministry's proffered interest, the uniform application of federal law, Ministry Reply Br. at 16, is "insufficient to justify imposition of federal common law," because of its "generic" and "generalized" nature. *Pescatore*, 97 F.3d at 11 (citing *O'Melveny*, 512 U.S. at 88, 114 S.Ct. 2048).

State interests are those which relate to the purpose of the particular law in conflict." *Koreag, Controle et Revision S.A. v. Refco F/X Assoc. Inc.*, 961 F.2d 341, 350 (2d Cir.), *cert. denied*, 506 U.S. 865, 113 S.Ct. 188, 121 L.Ed.2d 132 (1992) (citation omitted); *see also Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 348, 581 N.E2d 1042, 1044, 575 N.Y.S.2d 796, 798 (1991) (applying interests analysis); *In re Estate of Clark*, 21 N.Y.2d 478, 485-86; 236 N.E.2d 152, 156, 288 N.Y.S.2d 993, 998 (1968) (same); *In re Crichton's Estate*, 20 N.Y.2d 124, 133, 228 N.E.2d 799, 805-06, 281 N.Y.S.2d 811, 819 (1967) (same); *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 279 A.D.2d 408, 408-09, 720 N.Y.S.2d 102, 103-04 (1st Dep't 2001) (same).[15]

1. Actual Conflict of Law. In the case at bar, the Republic of Indonesia and the State of New York apply the same general rules to property disputes. The Republic of Indonesia offers the only specific rules-Indonesian statutes and regulations—that determine the respective rights of Pertamina and the Republic of Indonesia in the disputed funds. New York law directs us to apply these Indonesian statutes and regulations. There is thus no actual conflict of law.

Under New York law, the party who possesses property is presumed to be the party who owns it. *See Pollock v. Rapid Indus. Plastics Co.*, 113 A.D.2d 520, 525, 497 N.Y.S.2d 45, 49 (2d Dep't 1985) (noting that "possession of tangible property . . . creates a rebuttable presumption of ownership"). When a party holds funds in a bank account, possession is established, and the presumption of ownership follows. *See Kolodziejczyk v. Wing*, 261 A.D.2d 927, 928, 689 N.Y.S.2d 825, 825 (4th Dep't 1999) (joint bank account creates rebutt-

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[15] KBC argues that "the law of the situs of the disputed property generally controls." Appellee's Br. at 34. (citing 19A N.Y. Jur.2d Conflict of Laws §§ 26, 27, 31). But the New York Court of Appeals explicitly rejected the "traditional situs rule" in favor of interest analysis in *Istim*, 78 N.Y.2d at 347, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798.

able presumption of ownership in joint possessors); *Perkins v. Guaranty Trust Co. of New York*, 274 N.Y. 250, 261, 8 N.E.2d 849, 853 (1937) (possession of stock certificates creates rebuttable presumption of ownership).

Similarly, the Indonesian Civil Code provides that "whoever is in control of movable goods . . . shall be deemed to be the owner of such goods," Indonesian Civ. Code, art.1977, and the phrase "movable goods" includes cash held in bank accounts, Decl. of Robert N. Hornick ¶ 34.

Pertamina possesses the disputed funds. Under both New York and Indonesian law, we therefore proceed from the presumption that Pertamina owns the disputed funds. It is clear, however, that this presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee.[16] *See Fragetti v. Fragetti*, 262 A.D.2d 527, 527-28, 692 N.Y.S.2d 442, 443 (2d Dep't 1999) (holding that joint bank account created presumption of joint ownership, which was rebutted by contrary evidence of the parties' intentions and relative control over the funds); *Vergari v. Kraisky*, 120 A.D.2d 739, 740, 502 N.Y.S.2d 788, 789 (2d Dep't 1986) (holding that certificate of title constituted prima facie evidence of ownership of a vehicle, which was rebutted by contrary evidence of the parties' relative dominion and control over the vehicle); *Kurtish v. Iskokovic*, 204 A.D.2d 847, 848, 612 N.Y.S.2d 263, 264 (3d Dep't 1994) (holding that a "constructive trust" exists between two parties when there is: (1) a confidential or

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[16] As the district court stated, Pertamina's possession of the disputed funds "is not the end of the story. Under absolute Hornbook law, the Court must look past that and must recognize any property rights in that money which belong to any other parties . . . such as the right of a beneficiary to a trust or some similar kind of property right." Tr. of April 5, 2002 Hearing, at 80. KBC does not advance any contrary proposition of Indonesian law. *See* Petitioner-Appellee's Br. at 41, 44.

fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment); *Mendel v. Hewitt*, 161 A.D.2d 849, 850, 555 N.Y.S.2d 899, 900 (3d Dep't 1990) (stating that to determine whether a "constructive trust" exists, courts conduct "flexible" factual inquiries into the relationships between parties); *cf.* Dec. of Robert N. Hornick ¶ 34 (stating that under Indonesian law, possession establishes a presumption of ownership, but not stating that the presumption is irrebuttable). Under New York law, then, the property rights are determined by the underlying relationship between Pertamina and the Republic of Indonesia.

KBC urges us to apply New York law to this relationship, and thus, to the property rights in the disputed funds. Yet KBC has not pointed to any New York cases or statutes that purport to govern this kind of arrangement. The Republic of Indonesia is a foreign state, and Pertamina is a corporate entity of Indonesia, created by the legislative enactments and executive orders of the Republic of Indonesia. The relationship was created neither by contract nor by any other mechanism familiar to the laws of New York. It was established instead by provisions of Indonesian law uniquely applicable to the relationship itself:, Law of the Republic of Indonesia Number 8 Year 1971 and Government Regulation of the Republic of Indonesia Number 41 of 1982. Under New York law, the meaning of these two provisions of Indonesian law determines the property rights of the parties. There is thus no actual conflict between the laws of New York and the laws of Indonesia.

2. Interests Analysis. In any event, even if there were such a conflict, we are confident that Indonesian law would govern under the "interests analysis" that would be applicable under New York choice of law rules. *Cf. Allstate*, 81 N.Y.2d at 225, 613 N.E.2d at 938, 597 N.Y.S.2d at 906 (holding that "there is no conflict between New York and New Jersey law," and that even if there were a conflict, "New Jersey law

[would] govern[]"). As the New York Court of Appeals has explained,

> Applying interests analysis, we first look to the purposes of the statutes in conflict and identify the policies which the States seek to promote through application of their laws. Then, based upon the facts of the case which relate to the statutes' purpose, we determine which State has the greater interest in having its law applied.

Istim, 78 N.Y.2d at 348, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798. In the case at bar, Indonesian law sets forth a set of rules specifically resolving the ownership and disposition of the particular funds indispute. *See, e.g.*, Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5; Law of the Republic of Indonesia Number 8 Year 1971, Art. 15; *see also* Decl. of Sudargo Gautama ¶¶ 29-39 (describing the regulation of PSC revenues). More generally, Indonesian laws also reflect a significant national interest in the eventual fate of funds from LNG exploitation. An Indonesian Constitution "Elucidation" observes, "The earth and the waters and the natural riches contained therein are the fundamentals of the people's prosperity. Therefore they should be controlled by the State and be made use of for the greatest possible prosperity of the people." Elucidation of the Indonesian Const., Art. 33. Other Indonesian laws evince similar concerns. *See* Law Substituting Gov't Regulation No. 44 Year 1960; Law of the Republic of Indonesia Number 8 Year 1971. And, unlike New York's interests, Indonesia's interests implicate the particular circumstances at issue: the use of an Indonesian governmental instrumentality to generate funds in order to maintain satisfactory foreign exchange reserves.

In contrast, the New York statutory interests implicated here are relatively attenuated: (i) the creation and operation of trusts under New York law; (ii) the execution of sales contracts that operate under New York law to obtain funds for deposit in these trusts; (iii) New York's general interest "in

defining and protecting the property interests of its citizens and those who do business there," *Koreag*, 961 F.2d at 351; and (iv) New York's "interest as an international clearing-house and market place," *Indosuez*, 279 A.D.2d at 408-09, 720 N.Y.S.2d at 104 (citation and internal quotation marks omitted).

Moreover, these generic interests are only minimally implicated in this case. Both the LNG sales contracts and the trust mechanism complete their operations before funds arrive in Pertamina's subaccount. Whatever interest New York has in proper application of its contract or trust law has *de minimis* application here. And we do not see how a decision to apply New York law would materially further New York's reputation as a cosmopolitan, as opposed to insular and provincial, financial center. Indeed, if this latter reason alone sufficed to mandate New York law, courts would never apply foreign law to cases involving property located in New York bank accounts, which has clearly not been the case. *Cf., e.g., Clark*, 21 N.Y.2d at 485-86, 236 N.E.2d at 156, 288 N.Y.S.2d at 998 (applying Virginia law to determine the ownership of property located in New York).

We conclude that even if there were a conflict between New York and Indonesian law, New York choice of law rules would mandate application of Indonesian law to determine the relative property interests of Pertamina and the Republic of Indonesia in the disputed funds.

V. The Property Interests of the Republic of Indonesia and Pertamina in the Restrained Funds

There is some uncertainty about the theory pursuant to which KBC presses its claim to the attached funds. On the one hand, KBC argues that the disputed funds belong to Pertamina even as a matter of Indonesian law, and consequently can be attached. This theory of recovery therefore rests on the ownership of the disputed funds. On the other

hand, KBC, in its brief and at oral argument, also suggested that it had been entitled to rely on Pertamina's ownership of the LNG funds, and due to that reliance, is now entitled to attach those funds, without regard to the funds' legal ownership.

We reject both arguments. Like the district court, we conclude that under Indonesian law, all of the disputed funds except for the Retention belong to the Republic of Indonesia, and that it would have been unreasonable for KBC to rely on the notion that Pertamina owned those funds.

A. The Reliance Argument

KBC's reliance argument appears to run as follows: The Republic of Indonesia has established Pertamina as a separate legal entity, comparable to a private corporation, in order to do business with various other entities in international markets. When those entities make serious claims against Pertamina's assets, however, Pertamina disclaims ownership, and invokes the sovereign immunity protections of the Republic of Indonesia. KBC hints that Pertamina was a vehicle for the Republic of Indonesia to participate in international markets without fairly accepting the consequences of such participation.

This argument rests on the premise that when KBC entered into the geothermal energy contracts, KBC relied upon Pertamina's ownership of the disputed funds, and that it was reasonable for KBC to do so. We can find no evidence in the record to support these claims.

KBC has not elicited evidence from which a court could conclude that KBC actually relied upon any representation that Pertamina made about KBC's ability to recover from the disputed funds in the event of default. KBC does not allege that before or during the negotiation of the geothermal energy contracts, Pertamina made any oral or written representation about recovery in the event of default. The geothermal energy

contracts contain no reference to Pertamina's obligations to make funds available in the event of default, nor do they make any mention of LNG revenues. Neither Pertamina's separate legal status nor its previous title to the LNG supports the notion that Pertamina represented that it owned the disputed funds, or that the funds were available to KBC to satisfy a default. Moreover, neither fact establishes that Pertamina owns the proceeds from LNG sales, free of any prior obligations to the Republic of Indonesia.[17]

None of Pertamina's representations and actions, as reflected in the record, support the inference that Pertamina had an ownership interest in the disputed funds. To the contrary, Pertamina seems to have been entirely forthright about its lack of ownership rights. Pertamina's annual report, for example, states that "[r]evenue from LNG sales, after deduction of contractually agreed cost items, is shared between the Government (65%) and the contractor (35%). From the LNG operations *PERTAMINA earns one thirteenth (1/13) or approximately 5% from the Government's share.*" *Pertamina Annual Financial Report 2000*, at 17 (emphasis added).

Although the TPAAs do not denominate the Republic of Indonesia as owner of the LNG proceeds, Pertamina presents undisputed evidence that it has consistently transferred all of its Production Sharing Percentage to the Republic of Indo-

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[17] Nor can KBC rely on the structure or denomination of the disputed accounts at issue here to establish reliance. There is no evidence that KBC knew of the existence of the Bank of America trust accounts, let alone that it relied on their existence when contracting. KBC sought permission from the United States District Court for the Southern District of Texas to register its judgment in Delaware and California in addition to New York. Memorandum and Order of February 20, 2002, at 7. In New York alone, KBC served restraining notices on no less than seven banks. Writ of Execution and Order to Show Cause of February 22, 2002, at 5. This broadside approach suggests that KBC, while perhaps aware that LNG revenues existed and flowed through New York, knew nothing of these accounts, let alone who established or controlled them.

nesia's account at the Federal Reserve Bank of New York. And it was widely understood that the Republic of Indonesia relied on LNG funds to maintain its foreign currency reserves, which would have been more difficult had the funds belonged to Pertamina, rather than the Republic itself. *See* Decl. of Sahala L. Gaol. ¶¶ 11-12.

Further, the evidence of the LNG contracting process suggests that other persons dealing with Pertamina thought that Pertamina could not be relied on as a creditor. The LNG financing structure was designed to assure parties contracting with Pertamina that—while doing *LNG business* with Pertamina—they would not be left without financial recourse in the case of default. For instance, when money was needed to construct Pertamina's liquefaction facilities, the loan was *not* made directly to Pertamina. Rather, it was made to the trustee, Bank of America. The loan contracts described the "Borrower" as "Bank of America National Trust and Savings Association, solely as Trustee under the Trust Agreement [but) not in its individual capacity" and not "any one or more of the Producers (defined to include Pertamina]." Bontang VI Loan Agreement of March 4, 1997, at 4. The loan agreements further specified that debt payments must be made from the LNG proceeds in the trust *before* Pertamina or the PSC contractor obtain any profit. *Id.* at 18-19. The loan agreements therefore warranted that the borrowers' interest had priority over all other "obligations and liabilities," *id.* at 38, and the TPAAs provided for payment to Pertamina and the PSC contractor only *after* such debts were satisfied, *see, e.g.*, Bontang VI Trustee and Paying Agent Agreement of March 4, 1997, at 39. PSC contractors' interests were also protected through the trust such that they did not need to rely on access to Pertamina's assets in order to be paid. See Decl. of Ainun Na'im ¶ 22; Decl. of Robert Hornick ¶ 23(c). The TPAA mechanism thereby ensured that parties involved in the production of LNG never needed to rely on the independence and financial viability of Pertamina nor contend with Perta-

mina's potential sovereign immunity assertions, nor its willingness to comply with adverse judgments.

Other sophisticated commercial counter-parties thus expressly sought contractual mechanisms to guarantee recovery without reliance on the accessibility of Pertamina's assets. This suggests that even if KBC had actually relied upon Pertamina's ownership rights, such reliance would not have been reasonable. Others were aware of complexities in the relationship between Pertamina and the Republic of Indonesia, and consequent limits on Pertamina's ability to satisfy judgments against it. We would think that KBC, no less than others, could have arranged similar protections. Having failed to bargain for such protection before the fact and having failed to identify any actual reliance, KBC now asks us in effect to rearrange *nunc pro tunc* the relations of Pertamina and the Republic of Indonesia in KBC's favor. In these circumstances, we see no reason why a sophisticated commercial entity should not be required to abide by the consequences of its bargain. We therefore reject KBC's reliance argument.

B. The Property Interest Argument

As described above, the crux of the parties' disagreement about Indonesian law hinges on a provision of Government Regulation 41:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article shall be the Government's portion.

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5. This provision, by using the possessive "Government's," mandates that all of the disputed funds, with the exception of the five percent that constitutes Pertamina's Retention, belong to the Republic of Indonesia. Thus, we agree that most of "the share denominated as 'Pertamina's' share under the PSCs belongs entirely to the Government," Decl. of Sudargo Gautama ¶ 4, with the exception of the Article 5(1) Retention. KBC responds that "the 'Government's Portion' referenced in [Government Regulation 41] is not a property interest [but] simply a reference to the 'indebted obligations' [already] owed by Pertamina to the Government of Indonesia." Petitioner—Appellee's Br. at 46 (emphasis omitted). KBC contends that Law 8, the statute under which Regulation 41 was passed, creates these "indebted obligations." *Id.* at 14-16. Article 15 of Law 8 states that Pertamina's deposit of sixty percent of Net Operating Income from PSCs "shall constitute the payment" of corporate tax, various levies, and other contributions. Law of the Republic of Indonesia Number 8 Year 1971, Art. 15. KBC argues that the amount that Pertamina owes to Indonesia in taxes, levies, and contributions is the "Government's portion." The disputed funds are, in KBC's view, owned by Pertamina and owed to Indonesia.

But KBC's interpretation of Article 5 of Government Regulation 41 is inconsistent with the surrounding statutory text. While Article 5(2) identifies in mandatory terms what "shall be the Government's portion," the very next provision imposes a "tax," which it explicitly labels as such. Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5(3). The presence of a parallel provision explicitly referencing "tax" obligations suggests that Article 5(2) describes a different kind of obligation. The terminology of Article 15 of Law 8 underscores this inference: It refers to payments that "constitute" corporate taxes, customs levies, and the like, Law of the Republic of Indonesia Number

8 Year 1971, Art. 15, which are distinguished from other obligations.

Further, Article 5(2) of Government Regulation 41 and Article 15 of Law 8 refer to different amounts. The former, which creates the "Government's portion," refers to the "*difference* between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina." Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5 (emphasis added). That is, the Government portion comprises, with respect to each PSC, the total amount of the Net Operating Income, *less* the amount to which the particular PSC contractors are entitled, *less* five percent of the Net Operating Income—a sum that depends upon the exact percentage to which contractors are entitled under the PSC. And, as KBC's counsel explained at oral argument, this percentage varies from contract to contract, so that the "Government's portion" also varies above and below sixty percent of Net Operating Income. Thus, the "Government's portion" is a varying amount.

Article 14 of Law 8, in contrast, refers to a *fixed* "sixty percent of the net operating income from the operations of Production Sharing Contracts prior to the division between the Enterprise and the Contractor." Law of the Republic of Indonesia Number 8 Year 1971, Art. 14. The *fixed* sixty percent that is Law 8's "indebted obligation" therefore cannot be the same thing as the *varying* percentage of the Net Operating Income that is the "Government's portion."[18]

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[18] Despite this discrepancy, KBC's expert argues that "Article 14 and 15 [of Law 8] were implemented by [Government Regulation 41]." Decl. of Robert Hornick ¶ 27. But as a matter of Indonesian law, government regulations are not implementing mechanisms for legislation. Indonesian law contains "a bewildering variety of types of laws—statutes, regulations, decrees, circulars, etc." Eddy Damian & Robert N. Hornick, *Indonesia's Formal Legal System: An Introduction*, 20 Am. J. Comp. L. 492, 523 (1972). Among the varieties of law enumerated in the aforementioned

The record also contains uncontroverted evidence that Pertamina's share of the Net Operating Income is transferred directly to the Ministry's account at the Federal Reserve Bank of New York.[19] While this does not prove that the Republic of Indonesia has an ownership interest in such funds, it is consistent with such a conclusion.

We also agree with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference. *See, e.g.. Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir.1999), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000) ("Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations."); *see also In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir.1992) ("A court of the United States owes substantial deference to the construction France places upon its domestic law."). That Indonesia is a party to the case

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article are "Government Regulation[s]," "Presidential Decision[s]," "Regulation[s] of the Minister," and "internal memoranda." *Id.* at 524-25. This plethora of legal instruments in part ensues because the Indonesian executive branch has "considerably more executive law-making discretion than is the case, e.g. in the legal system of the U.S." *Id.* at 529. And under Indonesian law, "[e]ven statutes passed by the House of Representative commonly look[] to the executive orders and Presidential speeches for their inspiration and legal base." *Id.* at 507. Given the discrepancy in meaning between Law 8 and Government Regulation 41, we conclude that these rules do not exist in the hierarchal relationship described by KBC's expert's declaration.

[19] Pertamina introduced testimony that its long-standing practice has been to hand over funds from PSCs directly to the Republic of Indonesia through a transfer to the Federal Reserve Bank of New York. *See* Decl. of Ainun Na'im ¶ 23 (noting that "standing instructions to [Bank of America exist] to pay its Production Sharing Percentage to the account of the Government of Indonesia"); Supp. Decl. of Sahala L. Gaol. 113 (same). Such standing instructions were given in March 1997, prior to the Swiss arbitration in the case at bar. *Id.*

does not blunt this comity concern. *See Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as *parties* or as sovereigns with a coordinate interest in the litigation." (emphasis added) (citing *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895))). Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas. The Republic of Indonesia, of course, insists that Pertamina's reading of the relevant Indonesian law is correct. We thus conclude that Pertamina does not own any portion of the disputed funds, with the exception of the Retention. Like a trustee, Pertamina possesses the remaining funds but has no ownership interest in them. *Cf. Wulff v. Roseville Trust Co.*, 164 A.D. 399, 404-05, 149 N.Y.S. 683, 687 (1st Dep't 1914) ("Property which a debtor holds in trust for others . . . is not subject to an attachment issued against his property.").

C. The Retention

Pertamina also argues that it has no right to the Retention, or, at a minimum, no right to eighty percent of the Retention. We disagree. While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. Pertamina has not identified any Indonesian statute or regulation that grants the Republic of Indonesia ownership rights in the Retention. "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." *Gala Enterprises, Inc. v. Hewlett Packard Co.*, 970 F.Supp. 212, 217 (S.D.N.Y.1997) (citation and internal punctuation omitted); *accord Leon v. Martinez*, 84 N.Y.2d 83, 88 n. 1, 638

N.E.2d 511, 513 n. 1, 614 N.Y.S.2d 972, 974 n. 1 (1994) ("An assignment may properly relate to a future . . . right which is adequately identified. . . ."). As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

CONCLUSION

The district court correctly adjudicated the relative ownership interests of the Republic of Indonesia and Pertamina. We therefore affirm the district court's order granting KBC's motion to attach the Retention, and denying KBC's motion to attach the remainder of the disputed funds. Because this is not an appeal from a final judgment, proceedings in the district court will presumably move on to other matters. We direct the district court, in the course of those proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Nov 24, 2004]

No. M-18-302 (TPG)

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

against

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS
BUMI NEGARA ("Pertamina"),
Respondent.

OPINION

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[2] THE COURT: Let me just dictate a ruling from the bench.

I want to in a sense incorporate by reference the statement I made on the record yesterday beginning at page 159 and concluding on page 164.

MR. PANOPOULOS: Your Honor, it is difficult to hear you. I'm sorry.

THE COURT: I am sure that's right. I wasn't even looking out.

I want to incorporate by reference in what I say now the statement that I made beginning at page 159 of the transcript yesterday and concluding on page 164.

What this proceeding is about is what we have referred to as the unadjudicated accounts. The reason that terminology is used is that out of the several accounts at New York banks

that were set up to handle sales of petroleum products coming out of Indonesia, certain of those accounts were the subject of a ruling which I made in April 2002 and were the subject of a Court of Appeals ruling which was handed down in December 2002.

At that time, meaning in April 2002, I was of the view that there was not enough evidence to permit an adjudication of property rights with respect to certain accounts, and they have henceforth been called the "unadjudicated accounts." That terminology will no longer apply after this afternoon because the court is proceeding to adjudicate these remaining accounts. [3] To the extent that I am not making any ruling about certain of the unadjudicated accounts, the reason is that with respect to certain of them there are no issues.

The record reflects in prior rulings that the problem in this litigation arises from the fact that petitioner KBC served restraining notices on the banks with respect to the accounts in question; that is, the adjudicated accounts and the so-called unadjudicated accounts. These restraining notices were served in February 2002.

[4] THE COURT: The purpose of the service of these restraining notices was to proceed with the enforcement of a large judgment, which had been entered in a federal court in Texas. That judgment was on appeal to the Fifth Circuit, but no supersedeas bond had been posted, and therefore, KBC was free to proceed with the enforcement of that judgment.

What I am putting on the record this afternoon will not in any degree attempt to deal with the amounts of money which have been at issue. It will not attempt to present a chronology of all that has occurred in this enormously complicated litigation. It will simply deal with the essential issue which needs to he disposed of. From the very start, the principal issue in controversy regarding these accounts has been the result of the tact that KBC's judgment in this case, obtained

in the federal court in Texas, is against the respondent Pertamina, a company in Indonesia owned by the Indonesian government. KBC of course can enforce its judgment only against the property of Pertamina.

The main issue has been the degree to which the moneys in the accounts were the property of Pertamina or were the property of the Republic of Indonesia. The republic has been permitted to appear in this proceeding to protect its rights. It has been permitted to appear in the district court, and it has been permitted to appear in the Court of Appeals for the Second Circuit.

[5] In connection with the adjudicated accounts, what was held by the district court and was affirmed by the Court of Appeals was that funds in these accounts, nominally paid to Pertamina, after the subtraction and payment by the banks of expenses and also the share or shares of joint venturers, what the Court held was that that amount belonged to the government of Indonesia except for what is called the retention fee. The District Court and the Court of Appeals relied on a regulation which provided that this amount of money less the retention fee shall be the government's portion. And I'm quoting the English translation of the Indonesian law, and it has this phrase "the government's portion."

It is of some interest now to note that under Indonesian law, after Pertamina received the retention fee, or was credited with the retention fee, Pertamina was required to pay a tax out of that retention fee and to pay a dividend to the Republic of Indonesia. Both the tax and the dividend were to be paid to the Republic of Indonesia. Despite the fact that Indonesian law required the payment of the tax and the dividend, the District Court and the Court of Appeals did not hold that the tax and the dividend were the property of the government. These courts did not hold that the tax and the dividend were part of the government's share of the moneys in question. What was held in substance was that the

obligation to pay the tax and the obligation to pay the dividend meant [6] that Pertamina had to pay those amounts out of the retention fee, but that did not mean that the full retention fee was not the property of Pertamina. Those amounts were not property of the government until they were paid.

This is not an astonishing proposition. If a taxpayer earns a salary, the salary belongs to the taxpayer. It doesn't instantly belong to the government, although the taxpayer may ultimately owe the government a tax. If a corporation becomes obligated by a corporate resolution to pay a dividend, the revenues coming into the corporation are not the property of the shareholders the minute they come in. They become the property of the shareholders when the corporation pays the dividend.

So the only thing that was held to be the property of the government was what was referred to as the government's shame of those moneys which had come into the bank accounts and were left after paying expenses to Mobil Oil or shipping companies and so forth.

Now we come to the issues before us on the so-called unadjudicated accounts. What constitutes the principal controversy on the unadjudicated accounts, if not the sole controversy, relates to products refined from crude oil at certain refineries. The first of these is the Cilacap refinery, and there is a claim that the total of $387 million has flowed into the relevant bank accounts resulting from sales [7] of refined products from the Cilacap refinery, and it is contended that this $387 million was subject to the restraining notices. The bank account or bank accounts involved in those Cilacap funds are at the Bank of America. Was it one account or two accounts?

MR. DUGAN: Just one account, I believe.

THE COURT: One account. OK. So there was one account in the Bank of America, relating to Cilacap. And EXOR, was there one account or two accounts?

MR. DUGAN: One account there as well, your Honor.

THE COURT: What about MUSI?

MR. DUGAN: One account there as well. MUSI and EXOR are at Bank of New York.

THE COURT: So we have an account at Bank of New York relating to the refinery called EXOR, and, again, the funds involved sales of refined petroleum products refined from crude oil. The amount claimed to have flowed through that account and that was subject to the restraining notices is about $63 million. It appears that there is a controversy by the government of Indonesia on the EXOR account only as to about $38 million. But there is a substantial dispute nevertheless about the EXOR account.

Finally, there is the MUSI refinery account at the Bank of New York, and it is claimed that the amount of funds there which are subject to the restraining notices is about a [8] million and a half.

The statement I'm making is not intended to be a complete accounting of the unadjudicated accounts. There are certain accounts where no money has been seized, certain accounts where apparently there is no controversy. So the complete accounting for the unadjudicated accounts will come in some other form and I'm not going to attempt to deal with it in this statement. What I am trying to deal with is merely the issues in controversy about Cilacap, EXOR, and MUSI. And it can be said in order to simplify things that the issues are exactly the same with Cilacap, EXOR, and MUSI. So that I do not need to draw any distinction among those three accounts.

KBC contends that all of the money that flowed into those accounts was the property of Pertamina and, assuming a

proper calculation of the time period and other subsidiary matters perhaps, basically all of the funds flowing through these accounts were the property of Pertamina and subject to the restraining notices.

The government of Indonesia asserts that all of the funds belonged to the government of Indonesia. Pertamina takes the same position as the government. I don't think there will be any confusion on nomenclature. At various times in this litigation, we have referred to the republic, At times we have referred to the ministry of finance. In the hearings in the last two days we have talked mainly in terms of the government, [9] and I will probably speak in that fashion in my statement now.

When resolving the question of who the funds belonged to, the Court is looking to Indonesian law, as the Court did in connection with the earlier adjudicated accounts. But when the crucial factors are considered, Indonesian law is really no different from New York law. This was made abundantly clear the discussion held on the record yesterday morning, and it is clear from the voluminous papers submitted on the motions before the Court.

Incidentally, I neglected to say exactly what motions are before the Court. However, it is sufficient to simply state that there is a motion by KBC seeking to have the Court declare that the moneys passing through the Cilacap, EXOR, and MUSI accounts belonged to Pertamina and were subject to the restraining notices. The republic for the government of Indonesia has filed an appropriate motion seeking a declaration that those funds belonged entirely to the government. Pertamina, as I have said, is on the same side of this controversy with the government.

So we are at the question of, Who did the funds belong to. I started to describe the basics of the law. I will continue with that. Much of what I will say now is so obvious that anyone

reading this would hardly think it worth saying, but in the context of the issues here, this has to be said. Although Pertamina is a company owned by the government of [10] Indonesia and although its activities in the oil industry are subject to very thorough regulation, nevertheless, Pertamina is a separate company, separate from the government of Indonesia as an entity. This was recognized in the earlier phases of this litigation, and the fact is still true. Pertamina can enter into contracts. Pertamina has its own bank accounts, in its own name. The contracts it enters into are in its own name. Pertamina sells petroleum products in its own name. It receives payments in its own name which go into its own bank accounts. Parties in Indonesia and parties abroad can do business with Pertamina. They can sell equipment and raw materials to Pertamina. The government itself, according to the record, sells crude oil to Pertamina. And Pertamina buys crude oil from the government in Pertamina's name, and undoubtedly owes the government the price for that oil. If a party enters into a transaction with Pertamina, for instance, selling Pertamina equipment or building facilities for Pertamina, Pertamina will be obligated to pay for that equipment or those facilities. If Pertamina should fail to pay, Indonesia has a judicial system which will entertain a lawsuit if that is necessary between the supplier and Pertamina.

It was conceded, as one would expect, that Indonesia has a law system, the same as the rest of the civilized world. If someone claims that Pertamina is wrongfully withholding [11] payment on an obligation, for instance, for the sale of equipment or for the construction of facilities, that party has legal recourse against Pertamina in Indonesian courts. If that party wins, that party can get a judgment against Pertamina.

That party does not sue the government of Indonesia. The government of Indonesia would lodge the strongest possible objection if the party sued the government on the basis of an obligation of Pertamina. So if the supplier, the party I'm

talking about, wins a lawsuit, the party can get a judgment and can enforce that judgment. If Pertamina refuses to pay, that party can enforce the judgment by levying on property of Pertamina including bank accounts. This is of course in accordance with legal systems throughout the civilized world and Indonesia is no exception.

Pertamina has financial statements. These financial statements are included in reports. These financial statements, like the financial statements in the United States or elsewhere, have balance sheets and income statements. Pertamina has its assets. And the assets are listed as such. They are not listed as assets of the government of Indonesia.

Pertamina has liabilities, and they are listed as such. They are not listed as liabilities of the government of Indonesia. Pertamina has income listed as such. It is not listed as income of the government of Indonesia. It has expenses listed as such. These are not listed as expenses of the government of [12] Indonesia.

Pertamina seeks financing, sometimes abroad. And these financial statements are used to help obtain financing. Needless to say, Pertamina does not seek financing by saying it is not liable for anything and only the government is liable, who is not a party to the contract in question.

Pertamina has debt obligations. And parties have a right to look to. Pertamina on those debt obligations.

So all of this is in accordance with Indonesian law, Indonesian accounting practices. And these are the basics of the law and the accounting practices which exist.

Now, Pertamina sold refined petroleum products out of the refineries I mentioned. These products were exported and sold abroad. Purchasers paid for these products, and they paid Pertamina. And the funds that were paid were, according to agreement, deposited in the account at the Bank of America

and the accounts at the Bank of New York. Expenses were paid under the administration of the banks. If there were any joint venturers, the joint venturers' shares were paid. In other words, whatever was needed to pay parties other than Pertamina was taken out of the funds and paid by the banks. What was left was in Pertamina's name and this was the net receipts after paying outside parties whatever they were due.

The funds were duly transmitted, or were subject to transmission, from the New York banks to bank accounts of [13] Pertamina in Indonesia.

Here let me pause to reset to a complication which I do not want to describe in detail, but let me try briefly to state the necessaries. The amount of money which ended up literally staying, or being lodged in the New York banks was limited to the amount necessary to pay the judgment plus interest. This was done under the guidance of the Court of Appeals and also was implemented by the District Court and evolved in various ways that are not necessary to be described. So the amount actually lodged in New York banks pursuant to the restraining notices is a little over $300 million.

There are no funds from Cilacap, EXOR, or MUSI literally held up in New York banks. But the effect of court rulings and agreements is that if the Court decides that these funds were subject to restraint, the amounts that I have talked about as having flowed through these accounts will be deemed to be available to be applied to the judgment. This is not a perfect description, but it is as far as I'm going to go now. But this is why I have referred to the fact that amounts of money have flowed through the accounts. And that's what has happened. And the issue is, when those moneys flowed through the accounts, to whom did they belong? Pertamina or the government of Indonesia? If they belonged to Pertamina, they were subject to the restraining notices. If they belonged to the government of Indonesia, they were not subject to the [14] restraining notices.

I'm going back to the flow of the funds. As I said, the funds, after payment of expenses to outside parties, were in Pertamina's name. They were transmitted to Pertamina in Indonesia. There is no suggestion that these funds or any portion of them were paid to the government of Indonesia or seized by the government of Indonesia in any way because of some property interest asserted in these particular funds by the government. That was not done. This is a completely different picture from what was presented in connection with the adjudicated accounts.

These funds, in connection with Cilacap, EXOR, and MUSI, simply became part of the general funds of Pertamina, as well as receipts from other sales, and were used to pay the various expenses of Pertamina.

The record contains a financial statement of Pertamina for the year 2001. It shows a balance sheet as of December 31, 2001, and it shows a consolidated statement of income for the year ending December 31, 2001. There is also a statement for an earlier period, but I'm going to concentrate on the 2001 balance sheet and income statement.

The balance sheet lists assets of Pertamina. They include cash on hand in banks of about 20 trillion Indonesia rupiahs. Various other assets that one would expect are listed. The total assets are listed at what appears to be [15] about 96 trillion rupiahs. The figure is a little bit hard to read, but I believe it's about 96 trillion rupiahs.

The balance sheet, of course, lists liabilities and shareholders equity. Total current liabilities are listed at about 30 trillion rupiahs. Other liabilities appear to be about 37 or 38 trillion rupiahs. Stockholders equity is listed as about 28 trillion rupiahs. Total liabilities and stockholders equity is listed at about 96 trillion rupiahs. These are all listed as assets and liabilities and equity of Pertamina. They are not listed as assets and liabilities and equity of the government of Indonesia.

Now, in the consolidated statement of income, there is, as one would expect, a list 'of revenues and a list of expenses. The revenues for the year 2001 were about 212 or 213 trillion rupiahs. The figure is hard to read, but that is about it.

These revenues for 2001 included, as one would expect, the revenues from the export of oil products, the kinds of things which were going on with the Cilacap, EXOR, and MUSI accounts. The amount for 2001 was about 14 trillion rupiahs. The income statement, of course, listed expenses. The items under expenses total about 201 trillion rupiahs. The item labeled "profit before government share" is listed as about 10 1/2 trillion rupiahs. It appears that, pursuant to certain legal provisions which came into effect when Pertamina was [16] started, that the government was entitled to a share of these profits. That share is listed for 2001 as about 6 trillion rupiahs.

The net profit after all things are considered is listed as about 4 1/2 trillion rupiahs.

All of these items are listed as revenues, expenses, profits, and so forth of Pertamina. And one would expect this to be done, in view of the fact that Indonesian law, as I have described, is not some weird concoction. It is in accordance with the law of the civilized world, and its accounting practices are of the same nature.

Now we come to the argument of the government. The argument of the government was summarized by me to a very substantial extent in the pages I referred to from yesterday's transcript, pages 159 through 164. Almost all of the factual basis for the government's argument is something that I accept. Pertamina, as I have said, is a company owned by the Indonesian government. It is heavily regulated by the Indonesian government. But the argument of the government in this proceeding is based on a quite specific set of circumstances. Indonesia, pursuant to clear law, has a program, or a

policy, under which petroleum products are furnished to the people of Indonesia at prices which are set by the government and are based on a practice of government subsidies. This is referred to as the BBM program or policy. Pertamina participates in [17] this program, as it is directed to do by law. And in participating in this program, Pertamina is obliged to act for the benefit of the Indonesian government and the people of Indonesia. Under this program, Pertamina refines crude oil, turns it into products such as gasoline and fuel oil, and Pertamina sells these products either directly or indirectly to domestic purchasers in Indonesia. The record shows that to some extent the crude oil used in this program is lifted out of the ground by Pertamina, to some extent is lifted out of the ground by other parties, including the government of Indonesia or joint ventures between the government of Indonesia and other parties. Where the government of Indonesia is involved in lifting crude oil and selling it to Pertamina, this is a sale by the government of Indonesia to Pertamina, and Pertamina pays the government for that crude oil.

Pertamina must sell the refined products at prices which accord with the regulations or policies of the BBM program. The program has been described on the record here as being for Pertamina a no-loss and no-profit situation. Although there may be technical exceptions to this basic concept that are suggested in parts of the evidence, the government and Pertamina assert that the BBM program was indeed a no-loss and no-profit program as far as Pertamina was concerned, and the Court accepts that basic proposition. This means that if, for a relevant period, Pertamina was selling [18] products to domestic purchasers in Indonesia and was making a profit, then that profit would need to be paid to the government of Indonesia. On the other hand, if Pertamina was selling at prices which resulted in a loss to Pertamina, then the government would pay a subsidy to Pertamina to cover that loss. The calculation of profit or loss would be made by the method one would expect—that is, taking the costs to

Pertamina in connection with this program—that is, the cost of raw materials, the cost of refining, etc.—and then taking the revenues and determining which was larger. If the revenues exceeded the costs, there was a profit. If the revenues were less than the costs, there was a loss.

Now, here, it is necessary to deal with the circumstance, which is basically the main factor in the government's argument and Pertamina's argument, that revenues from export sales belonged to the government of Indonesia. The export sales were non-BBM sales. They were not subsidized. There were also some non-BBM domestic sales. All the non-BBM revenues were used in the calculation of whether there was a profit or loss in the BBM program. That is, even though the export sales were not BBM sales, and even though there were some domestic sales that were not BBM sales at the fixed prices, nevertheless, the revenues for such non-BBM sales were used in the calculation of whether there was a profit or a loss on the BBM program.

[19] One thing that has been said is that these revenues were a proxy for BBM costs. I am not sure what that means, but basically what happened is that these revenues were applied to reduce the BBM costs. Another way to put it is simply that they were added to the revenues on the BBM program. It's all the same thing.

If one wonders what happened to the costs associated with the non-BBM sales, the answer that has been given to the Court is that there were unitary costs and there were no specific costs associated, additional costs associated with the non-BBM sales. Exactly how that was accomplished is an accounting matter. It has not been gone into. But the Court does not doubt that that type of accounting would be quite legitimate.

So the non-BBM revenues were used as I have just described, and since we are concerned in our proceedings

here with the non-BBM revenues derived from export sales, I will probably concentrate to some extent on those particular revenues in further discussion.

Now, in the consolidated statement of income for the year 2001, there is an item listed under Revenues entitled "reimbursement of fuel expenses from the government." And in the year 2001, that was about 61 trillion rupiahs. The record does not show exactly how that was calculated, but it is conceded by Pertamina that the method of calculation is what I [20] described a few minutes ago—that is, taking the costs of BBM sales and the revenues from the BBM sales, and then taking the revenues from the non-BBM sales to add to BBM revenues or reduce BBM costs and netting out what results from those figures. And for 2001, what netted out was 61 trillion rupiahs.

Pertamina and the government urge that because the BBM program was for the benefit of the government and for the people of Indonesia and because the export sales revenues were used in the calculation of profit or loss from that program, this means that the revenues from the export sales were the property of the government of Indonesia from the moment that they were earned.

This brings me to my conclusion. I conclude that Pertamina and the government have drawn an incorrect conclusion. The fact that the revenues from the export sales were used in the calculation of BBM profit or loss in the way I have described. this fact under no circumstances means that those revenues belonged to the government of Indonesia at any time, when they were passing through the banks in New York or at any time.

The fact that these revenues from the export sales were used to calculate Pertamina's profit or loss on the BBM program is indeed a very strong indication that these revenues belonged to Pertamina. The government of Indonesia, in

2001, [21] paid a very large subsidy. The reason the subsidy was not 14 trillion rupiahs higher than the 61 trillion rupiahs is because the government considered that the 14 trillion rupiahs from the export sales belonged to Pertamina and reduced the costs of the BBM program to Pertamina that is, reduced Pertamina's costs. This is totally inconsistent with any idea that the 14 trillion rupiahs belonged to the government of Indonesia.

There is nothing about the BBM program or the accounting for it which takes away in the slightest from the fact that these revenues from the export sales belonged to Pertamina, were available to Pertamina to put in its bank accounts, were available for use by Pertamina to pay its expenses. None of that is in any degree contradicted by what has been asserted and what I have found about the BBM program.

Now, in addition to the use of the revenues to calculate the subsidy of 61 trillion, which is shown in the income statement of 2001, the 14 trillion was a line item in the income statement. The specific use of the 14 trillion in calculating the subsidy is not shown. That calculation is not shown and is not in any paper that is on the record here, although the method of that calculation has been conceded.

But, in addition to using the 14 trillion in a perfectly obvious way to calculate the subsidy due, the 14 trillion rupiahs was listed as a line item in the consolidated statement of income. The 14 trillion rupiahs had been received [22] by Pertamina from the export sales. And those 14 trillion rupiahs are shown as a line item on the statement of income. It's there. This is not something dreamed up by anybody. The statement of income simply does include, in black and white, 14 trillion rupiahs as revenues from the export sales. That 14 trillion rupiahs is used as one of the items adding up to the total revenues of 212 trillion rupiahs. It is used as part of the calculation leading up to the ultimate figure of profit before the government's share, and so forth.

This is in accordance with proper accounting practices. Nobody suggests that this financial statement was in any way fraudulent or incorrect. Nobody suggests that it is not in accordance with both Indonesian law and Indonesian accounting practices.

For these reasons, I conclude that it is clear beyond any shadow of a doubt that the export revenues flowing through the Cilacap, EXOR, and MUSI accounts were funds belonging to Pertamina which were subject to the restraining notices involved in this litigation. The matter indeed is not really complicated. The arguments of Pertamina and the government really made no showing of any substantial reason why this conclusion is not the right conclusion.

That concludes my ruling on the law, and we will now go to something else.

[23] SO ORDERED.

Dated: New York, New York
October 6, 2004

/s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

In the Matter of:

KARAHA BODAS CO., L.L.C., v.
PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI

Trial Volume 1
October 5, 2004

SOUTHERN DISTRICT REPORTERS, P.C.
500 PEARL STREET
NEW YORK, NY 10007
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[159] Now, let me address the issue we are about. I think that the exhibits before me and the written materials establish that there was and is this BBM program. I think the materials establish that the operations of Pertamina were very largely in furtherance of that program and that the program was [160] established by the government of Indonesia and Pertamina's operations in that program are pursuant to the laws of Indonesia, decrees, regulations, whatever. I think the materials before me establish that the sales that are at issue here, which yielded the funds that are now tied up, they came from what has been referred to as non-BBM business. But I think the materials establish that this business was not totally outside the BBM framework but that what was done and what was intended, what was legally decreed is exactly what Pertamina and the ministry say, that the revenues from those sales were used, were in effect treated as BBM revenues so as to offset BBM costs. And the purpose of this was to have that type of application so as to ultimately determine the ultimate question. That is, for some period in question, and I'm not exactly sure whether the period is at the end of a month or the end of a year or the end of a quarter, but at the end of some period, it was intended and established by law that there

would be a determination of whether Pertamina had made a profit or incurred a loss after taking into account all Pertamina's revenues, both from BBM sales and from non-BBM sales, and taking into account all of Pertamina's expenses. And those revenues and those expenses are reflected in the earnings statements of Pertamina. And they involve very, very large total amounts of money. I think the materials before me establish that if Pertamina incurred a loss, then the [161] government of Indonesia in some way paid Pertamina to cover that loss. Now, I'm not entirely sure of that, because there is some evidence that the government may have made up the difference between the BBM price, the fixed price to the Indonesian consumers and the market price. So I'm not completely sure of exactly what occurred in connection with what I have just said. But the principle is really not different. Regardless of the exact mechanics, I think the evidence shows that the government was making up the loss.

Now, the weight of the evidence is that if Pertamina made a profit, then it had to pay the profit to the government, although there is some question about that that is raised by a document introduced by KBC. But, again, for our ultimate question, in my view, that does not make a difference in the principle that we have to deal with.

So what I'm saying to you is that there is no reason, in my view, to introduce further evidence to support what I have said. I accept the idea that all of what I have said was done for the benefit of the Indonesian government and the Indonesian people, the Indonesian government representing the Indonesian people, that all of the activities of Pertamina were designed to further those governmental objectives. And I don't need to cite a great many specific instruments. There are plenty of governmental legal instruments which display what I have said, as far as I know.

[162] Now, what's the issue that remains? In my view, none of that solves the issue before the Court. And what I'm

coming to now, of course, is in my view the controversy. The question, in my view, is, what is the effect of this circumstance? Pertamina was and is a company. Pertamina, even according to the documents most heavily relied on by Pertamina and the government, Pertamina, for one thing had assets. This directive 105 has a section, section 3, about Pertamina's balance sheet, and it speaks of Pertamina's assets. It speaks of Pertamina's liabilities. Now, is the idea that these were assets but not assets? Were they something, was this a façade? Were these financial statements created with some hidden meaning that assets don't mean assets? These financial statements were undoubtedly used for many purposes by Pertamina, including getting financing in connection with its operations. Were they giving out these financial statements and having some hidden meaning? The financial statements have earning statements showing revenues of Pertamina, showing expenses of Pertamina. Were these not revenues of Pertamina? Were these financial statements, which were undoubtedly given to companies relying on them, was there some hidden meaning so that the revenues did not mean revenues of Pertamina and expenses did not mean expenses of Pertamina? Why does directive 105 talk about assets if there were no assets?

So, granted that at the end of some day, whether it's [163] at the end of the month or the end of a quarter or the end of a year, granted that there was to be a reckoning so that there had to be figuring of whether there was a profit or a loss to Pertamina, that profit and loss was figured on the basis of calculating the revenues of Pertamina versus the expenses of Pertamina. How else does one figure whether Pertamina has a profit or loss? Now, if they weren't revenues of Pertamina, there would be a very odd accounting. I would not know quite what kind of an animal to call that. Then I suppose you would have to say, well, the costs were not costs to Pertamina. They were simply the costs of the governement. Then why is the

government figuring whether there's a profit or a loss? It would be a very, very odd arrangement.

So the issue in my mind is this. While the revenues were coming in from these export sales and while they were going to Pertamina and while, as we discussed this morning, while they could be used as part of the funds to pay the obligations of Pertamina, while they could be used to back up contracts entered into by Pertamina, while Pertamina could spend that money, could put it in Pertamina's bank account, while all that was going on, is it or is it not the case that Pertamina, that it was Pertamina's money and that Pertamina could use it to pay any obligation that Pertamina had? Can it not be used to pay the obligation to KBC? And if such money is restrained in a New York bank account or comes through a New [164] York bank account, can it not be restrained to pay this obligation?

So what I'm trying to say is, most of what Pertamina and the republic have presented I accept. You do not need to spend any more time putting on evidence of that. What I do not accept without further exploration is a conclusion that because of those circumstances, Pertamina had no ownership interest in those funds and the government had the sole ownership of those funds. And that issue revolves, in my view, upon what ocurred with respect to who had the ability to spend the money, how the money was accounted for in a financial statement, and so forth and so on. And none of that, those issues are not even touched by this discussion of the BBM arrangements and so forth.

So try to come back tomorrow and focus on these issues, and don't take time in having a lot of testimony about things which I really accept. So we'll see you at 10 o'clock tomorrow.

MR. SLATER: Thank you, your Honor.

(Adjoured to 10:00 a.m., Wednesday, October 6, 2004)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-MC-00098 (TPG)

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("Pertamina"),
Respondents.

FINAL JUDGMENT

1. On December 4, 2001, the United States District Court for the Southern District of Texas entered judgment (the "Texas Judgment') in an action between Karaha Bodas Company, L.L.C. ("KBC") and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina (Persero) ("Pertamina"), confirming an UNCITRAL arbitration award requiring Pertamina to pay KBC a total of $261,166,654.92, plus interest at the rate of 4% per annum from January 1, 2001 until full payment. The United States Court of Appeals for the Fifth Circuit affirmed this judgment, and on October 4, 2004, the United States Supreme Court denied Pertamina's petition for writ of certiorari.

2. The Texas Judgment was registered in and became a judgment of this Court on February 22, 2002. On February 22, 2002, this Court issued writs of execution and restraining notices pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules requiring, *inter alia*, Bank of America, N.A. and

The Bank of New York to restrain certain funds that flowed through 24 trust accounts maintained in Pertamina's name at those banks in this District (such accounts, the "Trust Accounts").

3. Bank of America and The Bank of New York established 24 restraining accounts corresponding to the Trust Accounts in which to keep restrained funds (such accounts the "Restrained Accounts").

4. The Ministry of Finance of the Republic of Indonesia ("Ministry") challenged the District Court's jurisdiction under the Foreign Sovereign Immunities Act to restrain the funds, claiming that under Indonesian law the funds belonged to the Government of Indonesia and not the judgment-debtor Pertamina.

5. On April 24, 2002, the District Court issued a Final Order determining ownership of the funds restrained in fifteen of the Restrained Accounts located at Bank of America in New York (the "Adjudicated Accounts"). The April 24 Final Order held that with respect to these fifteen Adjudicated Accounts, which restrained revenues from the sale of Indonesian Liquefied Natural Gas ("LNG"): (1) Pertamina had a property right in those accounts to the extent of its Retention Fee and KBC could execute only upon an amount of the funds equal to the Retention Fee; and (2) the remaining LNG revenues were the Government's portion and cannot be executed upon by KBC. The Court certified the ruling for interlocutory appeal and stayed its ruling pending the appeal. At the time of the April 24 Final Order, the amount of revenues restrained in the Adjudicated Trusts was $292,874,622.17.

6. The April 24 Final Order did not determine ownership of the funds restrained in the remaining nine Restrained Accounts because the record at the time was insufficient to determine whether KBC was entitled to execution against those accounts. These nine accounts were subsequently denominated as the "Unadjudicated Accounts." (the Adjudi-

cated and Unadjudicated Accounts together make up the Restrained Accounts.)

7. KBC, Pertamina, and the Ministry appealed the April 24 Final Order and the Ministry moved to lift the stay to the extent of the amount of funds belonging to the Government. On June 18, 2002, the U.S. Court of Appeals for the Second Circuit issued an Order modifying the District Court's stay to apply only to sufficient funds to satisfy the judgment and maintaining the stay only as to funds up to the amount of KBC's Judgment. As a result of the Second Circuit's order, the amount of funds restrained in the Adjudicated Accounts over and above the amount of the judgment, plus interest, was released. The amount of revenues left restrained in the 15 Adjudicated Accounts on that date equaled $276,633,524.59. The Second Circuit's order did not affect the nine Unadjudicated Accounts, and the amount of funds in those accounts continued to grow as funds payable to Pertamina from the corresponding Trust Accounts were restrained in the Unadjudicated Accounts pending adjudication of the funds' ownership.

8. In an opinion issued on December 10, 2002, the Second Circuit affirmed the District Court's April 24 Final Order. Because the appeal was interlocutory and proceedings in the District Court would continue, the Second Circuit directed the District Court to continue the stay in force or to substitute one similar until such time as the parties' rights to the disputed funds were finally determined. The District Court then undertook to determine the amount of the Retention Fee associated with the funds restrained in the Adjudicated Accounts that could be executed upon, and to adjudicate ownership of the funds restrained in the nine Unadjudicated Accounts.

9. On March 18, 2004, this Court issued an Order modifying the restraining notices and requiring Bank of America to restrain funds equal only to the amount of the Texas

Judgment plus accrued interest. The March 18 Order was entered without prejudice to the parties' positions in the litigation for the purpose of maintaining sufficient security for KBC's judgment and releasing to the Ministry funds not required for such security. The March 18 Order required, *inter alia*, (1) the release to the Ministry of all funds restrained in excess of the amount of KBC's judgment plus interest, and (2) that only funds equal to the amount of the Texas Judgment plus accrued interest was to be left restrained in the fifteen Adjudicated Accounts at Bank of America, plus whatever additional amounts would be necessary to true up accrued interest. The funds kept restrained were to be treated as security for such amounts, if any, as were finally held in further proceedings in this Court and on appeal to belong to Pertamina and to be subject to execution against Pertamina from among the funds that passed through the Trust Accounts since February 22, 2002.

10. The March 18, 2004 Order further provided that if the Texas Judgment is finally affirmed, the amount restrained at Bank of America would be paid to KBC to the extent it is finally determined on appeal that funds passing through the Trust Accounts or restrained in the Restrained Accounts which belong to Pertamina and are subject to restraint are at least equal to the amount of the Texas Judgment plus interest. If it is determined that the amount belonging to Pertamina and subject to restraint is less than the amount of the Texas Judgment plus interest, the March 18 Order provided that the difference would be paid to the Ministry.

11. At various times, this Court has ruled that certain of the funds flowing through the Trust Accounts or restrained in the Restrained Accounts are the property of Pertamina and properly restrained and executable by legal process (such funds, "Executable Funds"). Specifically:

(a) On January 29, 2004, this Court issued an opinion ruling, among other things, that the restraining notices

on the Trust Accounts corresponding to the Adjudicated Accounts continued to be effective under N.Y.C.P.L.R. § 5222(b) even after the Bank of America trustee stopped restraining further amounts in the Adjudicated Accounts as a result of the amounts restrained in those accounts reaching double the amount of the judgment or the Second Circuit's June 18, 2002 Order. According to the Opinion, as Retention Fees passed through the corresponding Trust Accounts, they would be deemed restrained even though the trustee did not literally withhold those funds in the Adjudicated Accounts, such that an equivalent amount from the funds already restrained in the Adjudicated Accounts would be considered as becoming Retention Fees. Thus, the January 29 Opinion held that the restraints applied to $178,161,403, which the Court determined to be the amount of Retention Fees earned in respect of the funds that passed through the Trust Accounts corresponding to the Adjudicated Trusts from February 22, 2002 to the end of 2002, as well as to any Retention Fees earned thereafter, and that KBC was entitled to restrain and execute on this amount.

(b) On May 19, 2004, this Court issued an Opinion ruling, among other things, that Pertamina continued to earn a Retention Fee with respect to the Adjudicated Accounts, albeit in a reduced amount, until November 21, 2003. The May 19 Opinion further held that $132,992,871 of the funds that had passed through the corresponding Trust Accounts in 2003 represented the Retention Fees earned in respect of the those accounts in 2003 and, for the same reasons provided in the January 29 Opinion, that amount was deemed restrained in the Adjudicated Accounts and executable.

(c) On October 6, 2004, this Court orally ruled that Pertamina had a property interest in an additional $8,384,679 and $3,690,000 of the revenues in the

Unadjudicated Accounts that had been restrained from the sale of natural gas products because such amounts constituted, respectively, the amount of the 2002 Retention Fee earned in respect of the West Natuna, Corridor, and KMI Trust Accounts and the amount of Pertamina's participating interest in the contractors' share of the West Natuna Kakap Block PSC.

(d) On October 6, 2004, this Court also orally ruled that all funds that had been restrained and subsequently released from the Unadjudicated Accounts corresponding to the Cilacap, EXOR I, and MUSI II Trust Accounts and, after release, passing through the Cilacap and MUSI II Trust Accounts, through the date of this judgment, totaling $452,736,910, belong to Pertamina.

12. The amount of the judgment as of October 6, 2004, including simple interest at the rate of 4%, was $300,498,637.52. The amount as of October 6, 2004 restrained in the Adjudicated Accounts at Bank of America pursuant to the Court's March 18, 2004 Order was $301,051,979.84.

13. As a result of the above-described rulings, this Court hereby finds that the amount of Pertamina property restrained and/or deemed restrained in the Adjudicated and Unadjudicated Accounts since February 22, 2002 totals $775,965,863, and that this amount of Executable Funds exceeds the Texas Judgment plus accrued interest.

14. On October 6, 2004, this Court ordered Bank of America to release immediately $29,318,992—representing the $3,690,000 held to be Pertamina's participating interest in the West Natuna Kakap Block PSC, and $25,628,992 of the funds from the EXOR I account—to KBC. The amount of the judgment on October 12, 2004 (the date of the release of $29,318,992) is $300,669,894.32. Consequently, the unpaid amount of the judgment, as of October 12, 2004, is $271,350,902.32.

15. As a result of the above rulings, Bank of America is hereby ORDERED, pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules, to turn over to KBC $271,350,902.32, plus all accrued interest from October 13, 2004 to the date of full payment.

16. However, Bank of America's obligation to turn over such funds to KBC is hereby stayed until all U.S. appeals and review (if any) by the U.S. Supreme Court of this Final Judgment have been adjudicated or otherwise exhausted, or until further order of this Court.

17. During the period that the foregoing stay is in effect, simple interest at the rate of 4% per annum shall continue to accrue on the unpaid amount of the judgment, and Bank of America shall continue to restrain funds sufficient to pay the unpaid amount of the judgment and all interest that accrues in the future.

Dated this 22nd day of October, 2004.

/s/ Thomas P. Griesa
THOMAS P. GRIESA
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of March, two thousand and six.

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Pierre N. Leval,
Hon. Sonia Sotomayor,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos.
04-6551-cv(L)
04-6672-cv(C)

In the Matter of an Arbitration Between

KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee,

v.

BANK OF INDONESIA, Non-Party-Witness,
Garnishee,

v.

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Respondent-Appellant,

PERUSAHAAN PERTAMBANGAN MINYAK DAN
GAS BUMI NEGARA,
Respondent-Appellant.

APPEARING FOR APPELLANT PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA:	HENRY WEISBURG, Shearman & Sterling LLP, New York, NY (Pieter Van Tol, Scott Horton, and Victoria Paladino, Lovells, New York, NY, *on the brief*).
APPEARING FOR APPELLANT MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA:	FRANK PANOPOULOS (Carolyn B. Lamm, R. Shawn Gunnarson, and Eric Grannon, *on the brief*), White & Case LLP, Washington, DC.
APPEARING FOR APPELLEE:	CHRISTOPHER F. DUGAN (James E. Berger, Matthew S. Dunne, Danielle W. Pierce, and Carolyn E. Morris, *on the brief*), Paul, Hastings, Janofsky & Walker LLP, Washington, DC.

Appeal from a judgment of the United States District Court for the Southern District of New York.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the district court's judgment is AFFIRMED.

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-respondent-appellant Ministry of Finance of the Republic of Indonesia ("Indonesia") appeal from the November 19, 2004 judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) directing the Bank of America to turn over to petitioner-appellee Karaha Bodas Company, L.L.C. ("KBC") funds restrained to secure a money judgment against Pertamina.

We assume familiarity with the facts and procedural history and provide only a selective recitation here. On February 22, 2002, the district court issued restraining notices requiring several banks in the Southern District of New York to restrain funds deposited into certain trust accounts held in Pertamina's name. Of those, the "refinery accounts" received funds from Pertamina's export sale of refined petroleum products. The parties dispute whether funds flowing through the refinery accounts (the "refinery funds") were Pertamina's, and therefore subject to restraint and execution, or Indonesia's, and therefore not subject to restraint or execution. Because the amount that flowed through the refinery accounts, roughly $452 million, exceeds the current size of the underlying money judgment, roughly $319 million, a determination that the refinery funds belonged to Pertamina would afford KBC full recovery. We note that the precise funds deposited into the refinery accounts are no longer restrained. As reflected in the district court's March 18, 2004 order, and as confirmed at oral argument, the parties agreed that banks subject to the restraining notices would release all restrained funds to Indonesia except for an amount held in certain restrained accounts at the Bank of America that would be

sufficient to satisfy the underlying money judgment. The parties agreed that these funds would secure KBC's recovery of whatever funds passing through any of the accounts at issue, including the refinery accounts, the court determined to belong to Pertamina.

To determine the ownership of property, we first consider possession. Because the refinery accounts were held in Pertamina's name, Pertamina is their presumptive owner. *See Karaha Bodas Co. v. Pertamina*, 313 F.3d 70, 86 (2d Cir. 2002). "[T]his presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee." *Id.* Such a relationship would be "established . . . by provisions of Indonesian law uniquely applicable," so we now look to that law. *Id.* at 87.

The appellants contend that the Indonesian "BBM" system establishes Indonesia's ownership of the refinery funds. We disagree. First, although the no-profit-no-loss subsidy of the BBM regime does establish that Indonesia acts like a guarantor of Pertamina's BBM operation, it does not deprive Pertamina of control over the refinery funds. Pertamina is allowed to spend those funds for any purpose, such as building asphalt plants, subject only to budgetary limitations. Second, we find no inconsistency in the fact that Pertamina operates the refineries on behalf of Indonesia for the benefit of the Indonesian people and the proposition that Pertamina owns revenues generated from the sale of its output. In short, Pertamina points to no Indonesian legal directive that deems the refinery funds Indonesia's, *cf. id.* at 90-92, or indicates that upon their receipt, they are anything other than "property within Pertamina's control, which only Pertamina controls." *Id.* at 92. Because the presumption that Pertamina owns the refinery funds is unrebutted, the district court correctly held that those funds belonged to Pertamina and ordered the Bank

of America to turn over the balance of the underlying money judgment to KBC.

For the foregoing reasons, the district court's judgment is AFFIRMED. Because the appellants may seek review in the Supreme Court, KBC's pending motion of July 5, 2005, to vacate the district court's stay of execution and turnover is DENIED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____
Lucille Carr, Deputy Clerk

APPENDIX F

EXCERPTS FROM THE
FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

§ 1603. Definitions

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

* * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under

like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

* * *

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

* * *

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

* * *

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

* * *

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any

other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Nos. 05-1571 & 05-1573

Supreme Court, U.S.
FILED
AUG 2 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Petitioner,

-and-

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a federal court bound to accept uncritically the self-interested interpretation of foreign law offered by a foreign-government litigant?

2. Whether the Court of Appeals erred in applying Rule 69 of the Federal Rules of Civil Procedure to determine the susceptibility of certain funds held by Pertamina in its own name to attachment and execution where Petitioners have identified no federal common law holding that Rule 69 is inapplicable in cases against foreign states.

STATEMENT PURSUANT TO RULE 29.6

Respondent Karaha Bodas Company, L.L.C. has no parent corporation and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION

Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petitions for a Writ of Certiorari (the "Petitions") filed on June 7, 2006 by Petitioner PT Pertamina (Persero) (f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara) ("Pertamina") and by Petitioner Ministry of Finance of the Republic of Indonesia ("Government"). For all the reasons that follow, KBC respectfully submits that the Court of Appeals' decisions were correct in all respects, that there are no compelling reasons justifying a grant of *certiorari* by this Court, and that the Petitions should be denied in their entirety.

STATUTES AND RULE INVOLVED

In addition to the statutes identified in the respective Petitions, the following statutes are pertinent to the correct resolution of this case: Fed. R. Civ. P. 69; N.Y. C.P.L.R. § 5201; N.Y. C.P.L.R. § 5222. The relevant provisions of each of these statutes are reproduced at Resp't App. 1a-10a.

COUNTER-STATEMENT OF THE CASE

The instant Petitions mark the third time that Pertamina and the Government have sought to bring this straightforward commercial dispute before this Court. As described below, these Petitions are part of Pertamina and the Government's unrelenting effort to evade the rule of law and avoid payment of a lawful arbitration award rendered against Pertamina in 2000. Although Pertamina has revenues of over $20 billion, it resolutely refuses to pay the award or the U.S. judgment enforcing it. As part of their campaign to avoid Pertamina's legal obligation, Petitioners have used every available device

to challenge the decisions of the U.S. District Court for the Southern District of New York ("District Court") and the U.S. Court of Appeals for the Second Circuit ("Court of Appeals") that found Pertamina to be the owner of approximately $750 million of the over $8 billion that have passed through certain New York bank accounts since February 22, 2002.

While the Petitions purport to identify unresolved questions of federal law and to raise issues under the FSIA, 28 U.S.C. § 1601 *et seq.*, the decisions sought to be reviewed here were decided solely under New York and Indonesian law. The courts below acknowledged Indonesia's sovereign immunity at the threshold of these proceedings and ruled repeatedly that funds belonging to Indonesia were not subject to execution. Consequently, the remaining proceedings turned on Indonesian law principles governing Pertamina's ownership rights in the funds at issue, and on the construction of Article 52 of the New York Civil Practice Law and Rules, which governed KBC's enforcement rights in the funds. None of the arguments proferred by Pertamina and the Government justifies granting the Petitions.

The Arbitral Award and Confirmation Proceedings

On December 18, 2000, a Swiss arbitral tribunal awarded KBC $261.1 million as a result of Pertamina's breach of certain agreements related to the development of a geothermal energy plant in Indonesia. Because Pertamina refuses to pay the award, KBC has been forced to commence confirmation and enforcement proceedings in the United States, Hong Kong, Singapore, and Canada, and the arbitral award has been confirmed by the courts of each of those nations. As is pertinent here, the arbitral award was confirmed and

judgment was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment was affirmed by the United States Court of Appeals for the Fifth Circuit, whose order affirming the Texas Judgment this Court declined to review. *See Karaha Bodas Co. L.L.C. v. Pertamina*, 190 F. Supp. 2d 936 (S.D. Tex. 2001), *aff'd*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004). In addition to opposing KBC's attempts to enforce the arbitral award, Pertamina commenced annulment actions in the courts of Switzerland and Indonesia. Each of those actions was dismissed. *See Karaha Bodas Co., L.L.C. v. Pertamina*, 364 F.3d 274, 285 (5th Cir. 2004); Ruling, No. 01/BANDUNG/ WASIT.INT/2002, Sup. Ct. of Indon. (Oct. 4, 2004), at 43-44 (Resp't App. 13a-14a).

The New York Enforcement Proceedings

The instant Petitions seek to challenge the Court of Appeals' summary affirmance of the District Court's final judgment ruling that Pertamina is the owner of over $750 million in oil and gas revenues that have passed through Pertamina's bank accounts in New York, and that those revenues are subject to execution under New York law. The proceedings at issue in the Petitions began on February 22, 2002, when KBC registered the Texas Judgment in the District Court pursuant to 28 U.S.C. § 1963. Simultaneously with its registration of the Texas Judgment, KBC moved for, and the District Court issued, a writ of execution and restraining notices (the "Restraining Notices") pursuant to Fed. R. Civ. P. 69 and Section 5222 of the New York Civil Practice Law and Rules ("C.P.L.R."). The Restraining Notices were served on several New York banks including, *inter alia*, Bank of America and Bank of New York, and prohibited the

banks' transfer of funds from Pertamina's accounts. The writ of execution provided that KBC was entitled to execute upon "any property of Pertamina within this jurisdiction." Writ of Execution and Order to Show Cause at 2 (Feb, 22, 2002) (Resp't App. 19a).

Almost immediately following KBC's service of the Restraining Notices, the Government appeared (purportedly as a "non-party with interest") and claimed that it – not Pertamina – owned all the funds in Pertamina's accounts subject to the Restraining Notices (such funds, the "Restrained Funds"). As a result of the Government's competing ownership claim over the Restrained Funds, the District Court held several hearings (including an evidentiary hearing) over the course of two years to determine the ownership of the Restrained Funds and their susceptibility to execution and turnover to KBC.

The LNG Funds

At an initial hearing to consider the Petitioners' competing ownership claims, the District Court bifurcated the Restrained Funds into two groups. The District Court first considered the Restrained Funds resulting from Pertamina's liquefied natural gas ("LNG") operations (the "LNG Funds"). On April 26, 2002, the District Court ruled that Pertamina was the owner of a small portion of the LNG Funds known as the "Retention Fee." The District Court's ruling was based on an Indonesian law that expressly allocates the LNG Funds into a "Government Portion" and a "Pertamina Portion." The District Court held that the Indonesian Government owned the remainder of the LNG Funds, and that the LNG Funds owned by the Government were not subject to execution because the Government was not the judgment debtor.

The Court of Appeals affirmed the District Court's April 26, 2002 Order in all respects. The Court of Appeals first found that under Rule 69, it was required to "apply New York law to determine what assets are 'subject to enforcement, and thus available'" for execution by KBC. *Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70, 83 (2d Cir. 2002) ("*Karaha Bodas I*"). Like the District Court, the Court of Appeals then considered Section 5201 of the C.P.L.R., the New York law provision that defines the types of property against which a judgment creditor may enforce a judgment. After considering the language of Section 5201 and New York decisional law construing it, the Court of Appeals, like the District Court, concluded that KBC's right to execute upon the LNG Funds was dependent upon Pertamina's property interest in the LNG Funds. Specifically, the Court of Appeals found that, under Section 5201, KBC was entitled to execute upon any portion of the LNG Funds that Pertamina could "assign or transfer," including any future interest in the LNG Funds.

Finding that the parties agreed that New York law governed the question of what types of property could be attached, the Court of Appeals considered whether Pertamina's ownership interest in the LNG Funds was properly defined by New York or Indonesian law. Applying New York choice-of-law principles, the Court of Appeals found (a) that there was no actual conflict between New York law and Indonesian law insofar as they affected Pertamina's property interest, and (b) that even if there were a conflict between New York and Indonesian law, "New York choice-of-law rules would mandate application of Indonesian law to determine the relative property interests" of Pertamina and Indonesia in the disputed funds. *Karaha Bodas I*, 313 F.3d at 88.

Applying relevant Indonesian law principles, the Court of Appeals found that Pertamina owned the Retention Fee and that the Retention Fee was subject to execution by KBC. Specifically, the Court of Appeals found that Article 5 of Indonesian Government Regulation 41 established a "Government Portion" of the LNG Funds, and that this portion – consisting of all the LNG Funds except the Retention Fee – was owned by Indonesia. As for the Retention Fee, the Court of Appeals found that Pertamina had a future interest in the percentage of the LNG Funds comprising the Retention Fee, and that under Section 5201 of the C.P.L.R., this future interest – which the Court of Appeals characterized as "property within Pertamina's control, which only Pertamina controls" – was subject to execution. *Karaha Bodas I*, 313 F.3d at 92.

Both the District Court and the Court of Appeals conducted a thoroughgoing analysis of the relevant principles of Indonesian law in making their ownership determinations. The District Court accepted and relied upon the declarations of Indonesian law experts proffered by both KBC and the Government, and the Court of Appeals relied upon these declarations as well. Furthermore, while ultimately rejecting petitioners' argument that Pertamina lacked an executable interest in the Retention Fee, the Court of Appeals noted its agreement with its sister circuits that the Government's proffered interpretation of Indonesian law was entitled to deference, but not conclusive effect.

Pertamina and the Government filed respective Petitions for a writ of *certiorari* from this Court. Both Petitions were denied on June 2, 2003.

The Refinery Funds

Following its adjudication of the LNG Funds, the District Court directed the parties to make submissions concerning the ownership of the second category of funds held in Pertamina's name, which consist of revenues from Pertamina's sale of refined petroleum products to purchasers outside Indonesia (the "Refinery Funds"). As it had with the LNG Funds, the Government claimed to own all the Refinery Funds, although its claim relied on a different set of Indonesian laws than had governed ownership of the LNG Funds. The Government claimed that because the "BBM System" established under Indonesian law requires Pertamina to sell petroleum domestically on a "no-profit no-loss" basis (with the Government responsible for compensating Pertamina for any losses), Pertamina's revenues from export sales are constructively owned by the Government. The Government's initial motion seeking release of the restrained Refinery Funds identified two specific provisions of Indonesian law in support of its ownership claim; in the course of briefing KBC's motion for turnover of the Refinery Funds, however, the Government later identified no fewer than five additional laws that it claimed supported its position.

The District Court held a two-day evidentiary hearing on the Refinery Funds in October 2004. During that hearing, the District Court took evidence from KBC's expert on Indonesian law and from the Government's witness, a government auditor who gave extensive testimony concerning the use and accounting treatment of the Refinery Funds. Despite having specifically requested the opportunity to do so, neither Pertamina nor the Government called a witness to offer testimony concerning the Indonesian laws

that the Government claimed vested ownership of the Refinery Funds in the Government.

At the conclusion of the hearing, the District Court ruled from the bench that the Refinery Funds were completely within Pertamina's possession and control, and consequently, that they were owned by Pertamina and subject to execution pursuant to C.P.L.R. § 5201 and the Court of Appeals' December 2002 ruling. The District Court relied upon unrebutted record evidence demonstrating that Pertamina maintains actual and continuous possession of the Refinery Funds and that it is legally free to spend those funds for any purpose authorized by its budget (including paying the arbitration award). The District Court further found that because the Indonesian laws urged on it by the Government and Pertamina did not contain any language suggesting that the funds were owned by the Government, the evidence of Pertamina's complete possession and control of the Refinery Funds mandated a finding that Pertamina owned them.

The Court of Appeals summarily affirmed the District Court's order. Like the District Court, the Court of Appeals found that because Pertamina and the Government failed to identify any "Indonesian legal directive that deems the refinery funds Indonesia's," the compelling evidence of Pertamina's exclusive possession and control of the Refinery Funds left the presumption of Pertamina's ownership of those funds unrebutted. *See Karaha Bodas Co. v. Pertamina*, No. 04-6551, 2006 WL 565694, at *1 (2d Cir. Mar. 9, 2006) ("*Karaha Bodas II*").

Pertamina's Refusal to Pay

There is no question that Pertamina owes KBC the money at issue in this case: the arbitral panel ordered payment, the U.S. District Court for the Southern District of Texas confirmed that award and entered judgment upon it in December 2001, the U.S. Court of Appeals for the Fifth Circuit affirmed that judgment, and this Court denied *certiorari*. For more than four years, Pertamina has been a recalcitrant judgment debtor, repeatedly attempting to prolong and complicate these proceedings.

The District Court admonished Pertamina and the Government to stop wasting the court's time with their misconduct. The court aptly observed that these proceedings were "a complete waste of litigation," Tr. of Proceedings before S.D.N.Y., May 7, 2004 ("May 7 Tr."), at 2:14-16 (Resp't App. 25a), and noted the impropriety of Pertamina's and the Government's arguments:

> I think the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this useless litigation will keep going. But I want to warn you, I will not put up with further obfuscation of the issues. I will not put up with it, and there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.

Id. at 6:23-7:4. (Resp't App. 25a).

Repeatedly, the District Court criticized Pertamina and the Government for complicating the issues unnecessarily. For instance, at its October 5, 2004 hearing, after Pertamina

informed the District Court that it was refusing to honor a previous promise to pay the Texas Judgment as soon as this Court denied *certiorari* with respect to the Fifth Circuit's affirmance of it, the District Court warned Petitioners:

> Now, you have a choice and your client has a choice, and the republic has a choice, because the republic undoubtedly has a voice in this, to say the least. I warned you, on the record, and I repeated it, from a certain point — and I'll go over the record — Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.

Tr. of Proceedings before the S.D.N.Y., Oct. 5, 2004 ("Oct. 5 Tr."), at 3:22-4:3 (Resp't App. 27a); *see also* Apr. 19, 2004 ltr. from M. Slater to the Hon T.P. Griesa, at 2 (Resp't App. 29a) ("Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful."); Oct. 5 Tr., at 2:23-25 (Resp't App. 26a) ("Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter. . ."). At the District Court's invitation, KBC has filed a motion for sanctions as a result of this and other misconduct. The District Court will hear that motion on August 25, 2006.

Several other courts, both U.S. and foreign, have criticized Petitioners' litigation tactics in this case. For example, the Fifth Circuit concluded that Pertamina's litigation conduct was "dubious and somewhat deceptive" and likely undertaken "in bad faith." *Karaha Bodas Co. v. Pertamina*, 335 F.3d 357, 369 n.50, 372 (5th Cir. 2003). The

Fifth Circuit again noted its disapproval of Pertamina's conduct when it affirmed the Texas Judgment, stating that:

> We reject Pertamina's efforts to delay or avoid enforcement of the Award as **evidencing a disregard for the international commercial arbitration procedures it agreed to follow** ... We note that the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.

Karaha Bodas Co. v. Pertamina, 364 F.3d 274, 282 & n.5 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004) (emphasis added); *see also* Tr. of Proceedings before S.D. Tex., Apr. 2, 2002, at 15:8-13; 32:11-23; 42:7-9 (Resp't App. 31a-32a) (stating that the court was "furious" at Pertamina's conduct); Decision, No. HCCT28/2002, High Court of Hong Kong, (Mar. 27, 2003), at 14:H-J (Resp't App. 36a) (characterizing Pertamina's arguments in a related action to enforce the judgment as "forlorn"); Tr. of Oral Exam. of George Chan, at 78:8-79:4 (Resp't App. 38a) (High Court of Hong Kong issuing a criminal warning to an employee of one of Pertamina's subsidiaries after the court learned of "blatant" disobedience of its garnishment orders).

In sum, Petitioners have a long history of attempting to avoid payment by obfuscating the issues, and their efforts to identify a relevant circuit split are just the latest of their dilatory strategies.

REASONS FOR DENYING THE PETITION

I. The Second Circuit And The District Court Properly Considered And Determined The Indonesian Law Issues Before Them

In their respective Petitions, Pertamina and the Government each argue that the courts below accorded insufficient deference to the Government's proffered interpretation of its domestic laws. Petitioners couch their respective attacks on the Court of Appeals' decision in terms of the need for "international comity," "deference," and "respect." To be sure, those concerns are firmly embedded in American law. They are not, however, implicated by this case. An examination of the decisions below shows that both the District Court and the Court of Appeals carefully considered both the Indonesian laws and the Government's proffered interpretations of those laws in performing their respective analyses, but ultimately rejected the Government's interpretations as being inconsistent with the text of the Indonesian laws themselves.

A. The District Court And The Court Of Appeals Properly Considered The Indonesian Laws Cited By The Government In Determining The Ownership Of The Refinery Funds

Both the District Court and the Court of Appeals conducted painstaking examinations of each of the Indonesian laws relied upon by Pertamina and the Government, and the decisions concerning the Refinery Funds issue were predicated on those courts' findings that none of the laws purportedly governing the Refinery Funds contained any provision establishing governmental

ownership. *See Karaha Bodas*, 2006 WL 565694; *Karaha Bodas Co. v. Pertamina*, No. M-18-302, 2004 WL 2712556 (S.D.N.Y. Nov. 24, 2004). Indeed, the record reflects that the District Court reached its decision only after considering a voluminous evidentiary record that included 27 declarations submitted by Pertamina and the Government concerning the Indonesian legal regime (including six declarations from its legal expert, Sudargo Gautama, an Indonesian law professor who served as Pertamina's lead counsel in some of the proceedings in this dispute), the in-court testimony of Tahria Syafrudin (an Indonesian government official called by the Government to explain the Indonesian laws relied upon by Petitioners), the deposition testimony of Bambang Wiranto (a former Pertamina official who was designated as Pertamina's Rule 30(b)(6) witness to testify about the Indonesian legal regime), and the in-court testimony of Robert Hornick (KBC's expert witness concerning Indonesian law). Thus, Pertamina's suggestion that the courts below "completely ignored" the Indonesian laws cited by Petitioners in support of their argument is forcefully belied by the record.

Furthermore, the record demonstrates that the decisions below were manifestly correct. As KBC noted during the proceedings below, Indonesia clearly knows how to adopt laws vesting ownership of Pertamina's revenues in the Indonesian government: Regulation 41 (which the District Court and the Court of Appeals relied upon in finding that the Government owned the majority of the LNG Revenues) contained express language creating a "Government Share" of those revenues. The laws cited by Petitioners in support of their arguments on the Refinery Funds, in contrast, did not contain any such language. The lack of such language, combined with the unrefuted record evidence that Pertamina

alone possesses, controls, spends, and accounts for the Refinery Funds as its own, confirms the correctness of the decisions below finding Pertamina to be the sole owner of the Refinery Funds.[1]

B. When A Foreign State That Is A Litigant Profers A Self-Interested Interpretation Of Its Law To Suit Its Ends In The Litigation, A Federal Court Is Free To Evaluate The Legal Claim For Itself

Rule 44.1 of the Federal Rules of Civil Procedure provides, in pertinent part, that "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

Federal courts have ruled consistently that the text of Rule 44.1 vests district courts with broad authority to

1. Equally unavailing is the Government's argument that the Court of Appeals erred in failing to "conduct[] an independent examination of the principles underlying the concepts of Bezitter and Eigendomsrecht," Min. Pet., at 27. KBC does not dispute the existence of these legal concepts, but notes instead that, as presented by Indonesia's expert, they add nothing to the Indonesian law ownership analysis. Dr. Gautama, the Government's legal expert, himself noted that a party's status as a "bezitter" can be rebutted by evidence that that party has unrestricted use of the property at issue. Here, the District Court and Court of Appeals each found that Pertamina's exclusive use of the Refinery Funds compelled a conclusion that it owned those funds outright. In sum, while neither of the courts below used the terms "bezitter" or "eigendomsrecht" in their analysis, it is clear that their analyses addressed those concepts and supported a conclusion that they were inapplicable.

determine foreign law. *See Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) ("[Rule 44.1] provides courts with broad authority to conduct their own independent research to determine foreign law. . . .") (quoting *Bel-Ray Co., Inc. v. Chemrite*, 181 F.3d 435, 440 (3d Cir. 1999); *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) ("We urge district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations."); *In re Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) ("The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.") (quoting Rule 44.1 advisory committee's notes), *aff'd*, 161 F.3d 314 (5th Cir. 1998)). Indeed, "federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir.), *cert. denied*, 531 U.S. 917 (2000) (quoting *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y. 1980)).

Furthermore, while several courts – including the Court of Appeals in this case – have held that a foreign sovereign's interpretation of its domestic law is entitled to deference, those courts have also noted that the deference owed a foreign state's interpretation is not unlimited. *See, e.g., Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 192 (E.D.N.Y. 2003) ("although we begin with a presumption that the High Arbitrazh Court's December 18, 2001 decision constitutes probative evidence of matters of Soviet law addressed therein, [the] court is not under any absolute obligation to follow the lead of the Russian courts in construing Soviet

law") (citing *Karaha Bodas I*, 313 F.3d at 92) ("[A] foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference.").[2]

It necessarily follows, therefore, that lower courts are free to reject the interpretation of a foreign sovereign, particularly where that sovereign has a stake in the outcome of the litigation.

In sum, the Petitions essentially ask this Court to measure the appropriateness of a lower court's treatment of foreign law through an outcome-based analysis: the only degree of "deference" that would satisfy Petitioners in this case is a ruling holding that the Indonesian laws at issue bar KBC's enforcement claims. But Rule 44.1 expressly vests courts – not self-interested sovereign litigants – with the authority to determine issues of foreign law. The clear text of Rule 44.1 and the consistency with which it has been interpreted leaves no need for this Court to adopt a new rule giving a sovereign's interpretation of its own laws conclusive effect.

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2. In the circumstances presented here, the Government is not entitled to any deference as a matter of international comity. The Third Circuit has stated that "comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises. It also encourages the rule of law, which is especially important because as trade expands across international borders, the necessity for cooperation among nations increases as well." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). Indonesia and its wholly-owned and controlled state company have resolutely refused to pay the award, in defiance of the rule of law. To allow the Government to obtain the protection of comity would impermissibly allow it to "reap the benefits of our courts while avoiding the obligations of international law." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 632-34 (1983).

C. The Court Of Appeals Did Not Presume Any Similarity Between U.S. And Indonesian Law In Deciding Ownership Of The Refinery Funds

The Government points to a single sentence of the Court of Appeals' decision in *Karaha Bodas II* as evidence that the Court of Appeals failed to "analy[ze] Indonesian law on its own terms." Min. Pet., at 24. Specifically, the Government claims that the Court of Appeals' statement that under the BBM regime "Indonesia acts like a guarantor" draws an improper analogy to U.S. law.

Contrary to the Government's suggestion, the concept of a guarantor is not limited to U.S. law. As Government's own legal expert, Sudargo Gautama, has acknowledged, the Indonesian Civil Code also expressly permits the formation of guarantee relationships. *See* Sudargo Gautama, *Essays In Indonesian Law* 298-99 (1991) ("Personal guarantee for the debts of another person is regulated in Articles 1820 et seq. of the Civil Code."); Sudargo Gautama, Indonesia, 3 *Legal Aspects Of Doing Business In Asia And The Pacific* 193, 211 (1984) ("A guarantor has the same obligation as the debtor"); *see also* William A. Sullivan, *Indonesia*, INS 75-522 (CCH Asia Limited 2004) ("Personal guarantees are well known in Indonesia").

Because Indonesian law recognizes concepts of guarantee, there is nothing to support the Government's contention that the Court of Appeals "presume[ed] that the rights and obligations under U.S. law . . . are analogous to Indonesia's rights and obligations . . . vis-à-vis the Refinery Revenues." Rather, the Court of Appeals could very well have been referring to Indonesian guarantee principles. In all events, the Court of Appeals' statement was clearly intended

to be illustrative, and the Government's suggestion that the Court of Appeals' inclusion of this single sentence somehow led to the wrong result is difficult to credit.

D. Pertamina Lacks Standing To Challenge The Court Of Appeals' Conclusions Concerning Indonesian Law

Pertamina lacks standing to seek *certiorari* of the Court of Appeals' decisions insofar as those decisions relate to the Refinery Funds. A party lacks standing under Article III of the Constitution to bring an action in federal court, including a review of an earlier decision, unless the party has suffered "injury in fact." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The lower court decisions holding that Pertamina is the lawful owner of the Refinery Funds did not themselves cause Pertamina injury. As such, Pertamina has no standing to appeal the decisions on the ownership of the Refinery Revenues.

Moreover, to the extent Pertamina attempts to justify its petition by pointing to purported harm suffered by the Government of Indonesia, Pertamina lacks standing to bring such a claim as well. *See, e.g.*, PT Pet., at 14 ("the Second Circuit deprived the Government of Refinery Revenues"). "[G]enerally [a party] must assert his own legal rights and interests, and cannot rest his claim for relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). A party is only permitted to assert the rights of a third party where it can make two additional showings: (1) a close relationship with the person who possesses the right; and (2) the existence of a hindrance to the other party's

ability to protect his own interests. *Kowalski*, 543 U.S. at 130 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (holding attorneys did not have standing to assert rights of inmates denied counsel on appeal)).

Any suggestion that the Government has been "hindered" in protecting its interests in this case is simply not credible: the Government has been fully engaged in the New York proceedings since their commencement, and has submitted both briefing and evidence in connection with every issue considered by the District Court and the Court of Appeals. For this reason alone, Pertamina's petition should be denied.

II. There Is No Conflict Between The Circuits Concerning Federal Courts' Application Of Rule 69 In Execution Proceedings Against Foreign States

In *Karaha Bodas I*, the Court of Appeals employed a two-step procedure in choosing the appropriate law. First, pursuant to the express mandate of Rule 69, the Court looked to New York law to determine the **types** of property that are subject to execution, that is, to determine "what assets are 'subject to enforcement, and thus available to judgment creditors.'" *Karaha Bodas I*, 313 F.3d at 83 (quoting *Alliance Bond Fund Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999)). The Court of Appeals concluded that New York law permitted KBC to execute upon any property that Pertamina could "assign or transfer." *Id.* (citing N.Y. C.P.L.R. § 5201(b)). In the second step, the Court of Appeals resolved the issue of who actually owned the property that was subject to execution. In making this second determination, the Court of Appeals had, as an initial matter, to decide which choice-of-law rules to use to select the law that would govern the second issue. The Court of Appeals

rejected the Government's request that it apply federal common law choice-of-law rules to this second step; it instead applied the choice-of-law rules of the forum, New York, which require an interest analysis. As a result of this interest analysis, the Court of Appeals determined that Indonesian law, rather than New York law, governed the issue of who owned the property. Applying Indonesian law, the Court of Appeals found that the Government owned all of the LNG Funds, except the Retention Fee; as to the Retention Fee, the Court of Appeals found that Pertamina owned an executable future interest which was executable under New York law. Applying the same principles, the Court of Appeals found in *Karaha Bodas II* that Pertamina owned the Refinery Revenues.

The Government now claims that the circuits disagree about "whether the FSIA requires a federal court to apply a federal common law choice-of-law rule or the forum state's rules." Min. Pet., at 9.

> If the Court of Appeals had applied a federal common law choice of law rule, it would have also applied federal common law instead of New York law as the substantive rule of decision, as did the *Bancec* court. In doing so, the Court of Appeals would not have held that any part of the restrained funds was subject to execution as Pertamina's 'future interest' in the Retention Fee. . . .

Min. Pet., at 21.

Thus, the Government is now arguing that federal common law choice-of-law rules should have been applied to **both** steps of the Court of Appeals' analysis. That is, it now contends that federal common law choice-of-law (and through it federal substantive common law) should displace at the first step the

normal Rule 69 requirement that a court apply forum law in order to determine what types of property may be attached. The Government also contends that federal choice-of-law principles should displace the forum's choice-of-law principles at the second step, the determination of the respective property rights in the attached property.

The Government's characterization of the Court of Appeals' decision is inaccurate and misleading. A proper analysis of the record demonstrates irrefutably that there is no basis for granting the petition.

First, there is no conflict between the circuits concerning the use of Rule 69 in the first step of attachment proceedings against foreign states. None of the Ninth Circuit cases relied upon by the Government involved Rule 69 in execution proceedings against foreign states. *See Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561 (9th Cir. 1992) (determining applicable choice-of-law rule to use in considering applicability of illegality defense); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) (determining applicable choice-of-law rule to use in considering wrongful death liability); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (determining what choice-of-law rule controls application of respondent superior principles). Indeed, Rule 69 can properly be viewed as a mandatory choice-of-law for the first step of attachment proceedings, and it is mandatory even with respect to foreign states because nothing in the FSIA displaces it.[3]

---

3. The Advisory Committee Note accompanying Rule 69 contains a list of federal statutes governing execution or garnishment of property that the Advisory Committee considered to displace Rule 69. This list makes no mention of the FSIA. *See* Fed. R. Civ. P. 69 advisory committee's note.

The lack of any conflict of authority concerning the use of Rule 69 in cases such as this is apparent from the fact that federal courts have uniformly relied upon Rule 69 – and the state law attachment principles it incorporates – in attachment proceedings involving foreign sovereigns. *See, e.g., Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005) (applying state law as directed by Rule 69 despite argument that the FSIA should control all issues in which it is implicated); *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1285 (11th Cir. 1999) (finding that Rule 69(a) required the application of state law to determine the propriety of a garnishment against a foreign instrumentality); *Flatow v. Alavi Found.*, No. 99-2409, 2000 WL 1012956, at *1 (4th Cir. July 24, 2000) (noting, in a case involving the FSIA, "that Rule 69 of the Federal rules of Civil Procedure dictates that state law and procedures control proceedings on writs of attachment in aid of execution"). Because federal decisional law is uniform concerning the application of Rule 69 and forum law to execution proceedings against foreign states, there is simply no conflict justifying this Court's intervention here.

Second, there is no difference between the federal common law choice-of-law rules and the New York choice-of-law rules. The Government conceded below that the federal common law choice-of-law rule it proposed would mandate an "identical inquiry" as that required by the New York choice-of-law rule. Brief of Non-Party Appellant at 42, *Karaha Bodas I*, 313 F.3d 70 (2d Cir. 2002) (No. 02-7513). As the Government then conceded, "[b]ecause federal common law choice-of-law rules and the choice-of-law rules of New York both employ interest-based analysis and both lead to an application of Indonesian substantive law, there is no real conflict here as to which choice-of-law rule to use." *Id.*

Third, the Government never argued below that federal choice-of-law principles should displace Rule 69's requirement that the court look to forum law to determine, at the first step, what types of property could be attached. In fact, as the Court of Appeals noted:

> While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds.

Karaha Bodas I, 313 F.3d at 84. Because the Government did not raise this issue below it cannot raise it now. *See National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors v. Mineta*, 534 U.S. 103, 109 (2001).

Fourth, the Government's new contention that the Court of Appeals should not have used New York's "future interest" rule of decision is wholly irrelevant to the Court of Appeals' determination in *Karaha Bodas II* concerning the Refinery Revenues. The dispute concerning Pertamina's "future interest" is simply not applicable to the Refinery Funds, which Pertamina alone possesses and controls from the day it receives them in New York until the day it spends them in Indonesia or elsewhere. The "future interest" dispute is limited to the Retention Fees, which flow through the New York accounts but which are only finally paid to Pertamina in Indonesia. Accordingly, even if this Court were to completely accept the Government's argument to apply federal common law instead of New York's "future interest" rule of decision, the Court of Appeals' decision in *Karaha Bodas II* would be unaffected, and KBC would still be

entitled to turnover of the full amount of the Texas Judgment. It would thus be improvident to grant the Government's petition on this issue.

Fifth, Pertamina and the Government **prevailed** on the ultimate choice-of-law issue. The Court of Appeals found that under the New York choice-of-law analysis, the extent of Pertamina's property interest in the disputed funds was required to be determined under Indonesian law – as Petitioners urged – rather than under New York law, as contended by KBC. *Karaha Bodas I*, 313 F.3d at 84-88. The Court of Appeals then found that, under the Indonesian law principles urged on it by the Government, Pertamina's interest in the LNG Funds was limited to its interest in the Retention Fee, which it further found was property subject to execution under New York law. Similarly, in *Karaha Bodas II* the Court of Appeals looked to Indonesian law in determining that Pertamina owns the Refinery Revenues. Accordingly, as with the "future interest" issue, the District Court and the Court of Appeals applied the substantive law urged on them by Petitioners.

CONCLUSION

For all the foregoing reasons, this case simply does not present a "direct, open conflict in the courts of appeals." The lack of any such conflict, coupled with the Court of Appeals' adoption of the governing law urged on it by Petitioners, illustrates the lack of any need for this Court's intervention. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RULE AND STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VIII. PROVISIONAL AND FINAL REMEDIES

Amendments received to April 18, 2003

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Appendix A

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

Appendix A

(c) Proper garnishee for particular property or debt

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

§ 5222. Restraining notice

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature

or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in

the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the

restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order.

(d) Notice to judgment debtor or obligor. If a notice in the form prescribed in subdivision (e) has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns

a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);

2. Social security;

3. Public assistance (welfare);

4. Alimony or child support;

5. Unemployment benefits;

6. Disability benefits;

7. Workers' compensation benefits;

8. Public or private pensions; and

9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

* * * *

APPENDIX B — RULING

NUMBER: 01/BANDUNG/WASIT.INT/2002
FOR JUSTICE BASED ON ALMIGHTY GOD

THE SUPREME COURT

having heard the appeal of the District Court's ruling regarding an Arbitral Award has handed down the following ruling in the case of:

KARAHA BODAS COMPANY, L.L.C, a corporation established under the laws of the Cayman Islands, domiciled at Jalan T. B. Simatupang, Kav. 10, Jakarta 12310, now with offices c/o Jaya Geothermal, L.L.C. 565 Fifth Avenue, 29th Floor, New York 10017, in this matter represented by their attorneys: RAMBUN TJAJO, JD, SARAH NATALIA, JD, and PERRY CORNELIUS, JD, Attorneys and Lawyers, with offices in the Graha Niaga, 2nd Floor, Jalan Jenderal Sudirman, Kaveling 58, Jakarta 12190, the Appellant, the former Defendant;

versus

THE STATE OIL AND GAS COMPANY (PERTAMINA), with offices at Jalan Perwira No. 2, Jakarta 10110, in this matter represented by their attorneys: 1. Prof. Dr. S. Gautama, Esq., 2. Dr. T. Tuegeh Longdong, JD, LLD, 3. Liz Asnahwati, JD, and 4. Tety Irawati, JD, Attorneys and Lawyers with offices at Jalan Medan Merdeka Timur, No. 9, Jakarta 10013, the Appellee, formerly the Plaintiff;

Appendix B

and

PT. PLN (Incorporated), domiciled at Jalan Trunojoyo, Kebayoran Baru, South Jakarta 12160, in this matter represented by their attorneys: 1. Derina, JD., 2. Rex R. Panambunan, JD., and 3. Bobby Hadi Pumomo, JD., all employees of PT. PLN (Incorporated), with offices at Jl. Trunojoyo, Block M I/135, Kebayoran Baru, South Jakarta, the Co-Appellee, formerly the Co-Defendant;

The Supreme Court;

Having read the relevant documents;

* * *

filed by the Arbiter or his attorney;

To consider, that the opinion of the Supreme Court on the above-mentioned reasons:

regarding the objections to 3 and 4:

that these objections can be upheld because the lower-court judge misinterpreted the law in the following considerations:

a. that the Plaintiff's suit was basically a suit to set aside the Arbitral Award reached in Geneva, Switzerland on December 18, 2002 (Final Award in an Arbitration Procedure under the UNCITRAL Arbitration Rules), Exhibit P-1);

b. that under Article 1 Point 9 of the Law No. 30 of 1999, the ruling handed down by an arbitration institution or an individual arbiter outside the jurisdiction of the Republic of Indonesia, as in the arbitration decision whose setting aside was petitioned for by the Plaintiff (Exhibit P-1), is the International Arbitral Award;

c. that Law No. 30 of 1999 only governs International Arbitration in Article 65 through Article 69, which besides governing the conditions for recognizing and enforcing a International Arbitral Award in Indonesia, also governs the procedures for petitioning for said Arbitral Award;

d. that Article V Paragraph (1) of the New York Convention of 1958 (Convention on the Recognition and Enforcement of International Arbitral Awards) which was ratified and declared in force by Presidential Decree No. 38 of 1981 reads:

> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if. . . . etc.;

e. "The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

that furthermore Exhibit T.5 shows that the Plaintiff's and the co-Defendant's attorney has filed an appeal against the

Appendix B

Arbitral Award under dispute (Exhibit P-1) with the Swiss Supreme Court under the International Civil Law of Switzerland;

f. that therefore the Central Jakarta District Court does not have the authority to hear and rule on the suit to set aside the International Arbitral Award filed by the Plaintiff;

Considering that based on the above considerations, and without the need to take into consideration the other objections, in the opinion of the Supreme Court there are sufficient reasons to grant the appeal of the Appellant KARAHA BODAS, LLC and to set aside the Central Jakarta District Court ruling dated August 27, 2003 No. 86/PDT.G/2002/PN.JKT.PST, and the Supreme Court will render its own decision on this case with such disposition as to be stated below;

Considering that therefore the Appellee is the losing party, it will be ordered to pay court costs at both levels of justice;

Noting the Articles of Law No. 30 of 1999, Law No. 14 of 1985 as amended by Law No. 5 of 2004 as well as other Articles of the relevant laws;

TO RENDER A DECISION TO

grant the appeal of the Appellant KARAHA BODAS, L.L.C.;

set aside the Central Jakarta District Court ruling dated August 27, 2002 No.86/PDT.G/2002/PN.JKT.PST;

TO RENDER ITS OWN DECISION

To the Objections

to uphold the Defendant's objections;

To the Application for Interim Relief and in the Substance of the Case

to declare that the Central Jakarta District Court did not have the authority to hear and adjudicate the Plaintiff's suit;

to order the Appellee/Plaintiff to pay court costs at the two levels of justice, which at the appeals level is set at Rp. 500,000 (five hundred thousand rupiah);

In witness thereof the ruling was handed down at the deliberative session of the Supreme Court Council on Monday, March 8, 2004 by Bagir Manan, chief justice of the Supreme Court, as the chairman of the session, Prof. Dr. Paulus E. Lotulung, JD and Marianna Sutadi, JD, as associate members, and pronounced in open court on the same day by the chairman of the session in the presence of Prof. Dr. Paulus E. Lotulung, JD and Marianna Sutadi, JD, associate members, Shirley P. Widodo, JD, substitute clerk in the absence of the two parties.

Appendix B

Associate Members
signed
Prof. Dr. Paulus E. Lotulung, JD
signed
Marianna Sutadi, JD

Chairman
signed
Bagir Manan

Costs:

1. Stamps	Rp	6,000
2. Recording	Rp.	1,000
3. Cassation Administration	Rp.	493,000
Total	Rp.	500,000

Substitute Clerk
signed
Shirley P. Widodo, JD

For the copy
REPUBLIC OF INDONESIA SUPREME CQURT
DIRECTOR OF CIVIL MATTERS
/signature/
ANDAR PURBA, JD
Civil Service ID No. 040015551

/seal/
SUPREME COURT

APPENDIX C — WRIT OF EXECUTION AND ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302

In the Matter Of An Arbitration

Between Karaha Bodas Company, L.L.C.,

Petitioner,

v.

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

WRIT OF EXECUTION AND
ORDER TO SHOW CAUSE

Upon consideration of the application of Karaha Bodas Company, L.L.C. ("KBC") for a writ of execution, the declaration of Christopher F. Dugan, dated February 22, 2002 and the exhibits annexed thereto, and the accompanying memorandum of law, and sufficient cause appearing therefore; and

Upon consideration of the final judgment (the "Judgment") entered in an action (the "Texas Action") in the United States District Court for the Southern District of Texas

between petitioner KBC and respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") on December 4, 2001, confirming the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Oth*ers. YD/IS 60 319 and awarding KBC $261,166,654.92, plus interest from January 1, 2001; and

Upon consideration of the Order entered by the court in the Texas Action on January 25, 2002 (the "Texas Order") finding that a reasonable time has passed to satisfy the requirements of § 1610(c) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1610(c), and authorizing KBC to commence execution of the Judgment; and

Upon consideration of the *ex parte* Writ of Garnishment issued February 11, 2002 by the court in the Texas Action against Pertamina's assets in Texas; and

Upon consideration of the Certification of Judgment for Registration in Another District, entered by the court in the Texas Action on February 21, 2002 and filed with this Court on February 22, 2002; and

It appearing that Rule 69 of the Federal Rules of Civil Procedure, the FSIA and the Texas Order require a court-ordered Writ of Execution authorizing KBC to execute upon any property of Pertamina within this jurisdiction; and

It appearing that there exist within this jurisdiction certain monies, securities or other assets (the "Funds") in accounts held by or for the benefit of Pertamina (the

"Accounts") and maintained by the banks listed on Exhibit A annexed hereto (the "Banks"); and

It appearing that, pursuant to the FSIA and the Texas Order, a court order authorizing KBC to issue restraining notices upon the Banks pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules ("CPLR") applicable thereunder is required; now, therefore

IT IS HEREBY ORDERED, that a Writ of Execution is hereby issued; pursuant to this Writ of Execution, Rule 69(a) of the Federal Rules of Civil Procedure and the FSIA, 28 U.S.C. § 1610(c), KBC is authorized to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date in total to the sum of $261,166,654.92 plus interest from January 1, 2001 until full payment; and

IT IS FURTHER ORDERED, that (1) pursuant to the Writ of Execution, Rule 69(a) of the Federal Rules of Civil Procedure and CPLR § 5222, KBC shall be permitted to serve upon the Banks restraining notices in form substantially similar to the attached Exhibit B; and (2) that each such restraining notice shall be issued either by this Court or by the Clerk of Court; and

IT IS FURTHER ORDERED, that pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of the CPLR, KBC shall promptly serve Pertamina and the Banks with a copy of this order to show cause and the restraining notices, together with papers submitted in support thereof,

and that such service shall be deemed good and sufficient service (1) if made by hand upon counsel for Pertamina, Cleary, Gottlieb, Steen and Hamilton, 1 Liberty Plaza, New York, New York 10006, on or before 5:00 p.m. on February 25, 2002, with a copy by certified mail to Pertamina at 1360 Post Oak Blvd., Suite 1590, Houston, Texas 77056, and (2) if made by hand upon the Banks on or before 5:00 p.m. on February 25, 2002, such service to be made by any person who is over 18 years of age and not a party to this action; and

IT IS FURTHER ORDERED, that Pertamina show cause before the Honorable Thomas P. Griesa, United States District Judge, Courtroom 26B, United States Courthouse, 500 Pearl Street, New York, New York, on the 18th day of March, 2002, at 10:00 a.m., or as soon thereafter as counsel may be heard, why an order of execution pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and CPLR § 5230 shall not issue to the Sheriff of New York County or the United States Marshal directing him to satisfy the Judgment out of the Funds held by or for the benefit of Pertamina in the Accounts maintained by the Banks; and

IT IS FURTHER ORDERED, that objections or responses, if any, to the relief requested herein shall be filed with the Court and served in a manner so as to be received by (1) counsel for KBC, Jones, Day, Reavis & Pogue, 599 Lexington Avenue, New York, New York 10022, attention: Steven C. Bennett, on or before 5:00 p.m. on March 12, 2002, and (2) the Banks, on or before 5:00 p.m. on March 12, 2002; and

Appendix C

IT IS FURTHER ORDERED, that KBC make take any and all discovery of the Banks as provided under Rule 26 of the Federal Rules of Civil Procedure, and that all responses to any such discovery requests shall be served in a manner so as to be received by counsel for KBC, Jones, Day, Reavis & Pogue, 599 Lexington Avenue, New York, New York 10022, attention: Steven C. Bennett, no later than five (5) days prior to the hearing.

Dated: New York, New York
February 22, 2002

s/ Thomas P. Griesa
UNITED STATES DISTRICT JUDGE

Appendix C

EXHIBIT A

Bank Indonesia
165 Broadway, 31st Floor
1 Liberty Plaza
New York, New York 10006

Bank of Montreal Trust Company
c/o Harris Trust Company of New York
88 Pine Street
New York, New York 10005

Bank of Nova Scotia Trust Company of New York
One Liberty Plaza, 23rd Floor
New York, New York 10006

Bank of Taiwan New York Agency
The Crown Building Center
730 Fifth Avenue, 9th Floor, Suite 907
New York, New York 10019

Bank Rakyat Indonesia
430 Park Avenue, 2nd Floor
New York, New York 10022-3505

PT Bank Central Asia (Persoro)
641 Lexington Avenue
New York, New York 10022

Appendix C

PT Bank Negara Indonesia (Persero) Tbk
55 Broadway
1 Exchange Plaza, 5th Floor
New York, New York 10006-3002

PT Bank Mandiri (Persoro)
100 Wall Street, 18th Floor
New York, New York 10005-3702

APPENDIX D — EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUM NEGARA (PERTAMINA),

Respondent.

May 7, 2004
5:10 p.m.

[2] (In chambers; phone conference)

THE COURT: I wanted to talk to you about our schedule. I suppose this is a waste of time, but there is a great deal of useless litigation going on, and I have gotten a start on one motion, which has voluminous papers. It's the motion of KBC about the year 2003, wanting a turnover, a declaration with respect to the 2003 period of time up to November.

Now, that has a voluminous record all itself. Then there is a litigation about the unadjudicated accounts. And you're worried about the schedule. And I don't want to really be

harsh about the schedule. Mr. Slater has asked for some time, and I would certainly like to accommodate that. But all this, of course, is created by the fact that there still is not firm security for this judgment. To me, that is a complete waste of litigation.

* * *

THE COURT: I think the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this useless litigation will keep going. But I want to warn you, I will not put up with further obfuscation of the issues. I will not put up with it, and there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.

* * * *

APPENDIX E — EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS CO., L.L.C.,

Plaintiff,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (Pertamina),

Defendant.

October 5, 2004
10:10 a.m.

[2] * * *

MR. SLATER: Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter that —

* * *

THE COURT: There is a lawful judgment which is final. There is an indebtedness. It is open and shut. And there was a commitment.

Appendix E

Now, you have a choice and your client has a choice, and the republic has a choice, because the republic undoubtedly has a voice in this, to say the least. I warned you, on the record, and I repeated it, from a certain point — and I'll go over the record — Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.

* * * *

APPENDIX F — LETTER FROM MATTHEW D. SLATER TO THE HONORABLE THOMAS P. GRIESA DATED APRIL 19, 2004

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, W.C. 20006-1801
(202) 974-1500

April 19, 2004

VIA FACSIMILE

Hon. Thomas P. Griesa
United States District Court for
the Southern District of New York
500 Pearl Street, Courtroom 26B
New York, New York 10007

Re: *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*. No. 21-MC-00098

Dear Judge Griesa:

I am writing to report on developments relating to the matters discussed during the telephone status conference conducted on April 12, in particular in relation to the Court's request that Pertamina confirm its readiness to pay the judgment in this case.

As I have previously stated in open court, it is Pertamina's policy to observe its legal obligations and international

commitments. Its preferred method of dispute resolution is amicable agreement, and it continues to seek a negotiated settlement in this case. Although it believes that the arbitration award is deeply and fundamentally flawed (and an Indonesian court has so held) and that all or most of the funds in the restrained accounts belong to the Ministry, it is mindful that the courts in the United States and Hong Kong thus far have concluded that the award may be enforced, and Pertamina has given careful consideration to this Court's questions about Pertamina's intentions as to payment.

I am pleased to report, therefore, that I am now authorized by Pertamina to advise the Court that Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful. In return, Pertamina expects that KBC will agree to suspend proceedings concerning the arbitration award in other jurisdictions and, upon payment, that KBC would dismiss all such proceedings with prejudice. Pertamina's commitment is without prejudice to its firm position as to the flaws in the arbitration award and as to ownership of the restrained funds, but rather is undertaken to bring this dispute to a conclusion upon a final and unreviewable determination that the arbitration award is enforceable in the United States.

Based on Pertamina's commitment to pay the judgment without regard to ownership of the funds subject to restraint, the litigation before this Court can be suspended, and there is no need for the Rule 30(b)(6) deposition, as both the Court and KBC acknowledged during the April 12 conference.

Accordingly, we respectfully request that the Court vacate or stay its discovery order entered April 15, 2004.

Respectfully,
s/Matthew D. Slater
Matthew D. Slater

cc: Christopher F. Dugan
Carolyn B. Lamm

APPENDIX G — EXCERPTS OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

01-CV-634

KARAHA BODAS COMPANY LLC

plaintiff

v

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA

defendant

April 2, 2002
Houston, Texas
12:30 p.m.

PROCEEDINGS

* * *

And that issue was raised. In order for Pertamina in those sorts of circumstances to give greater authority to their counsel, they have to go to the highest reaches of the company.

THE COURT: You know, it's so sad.

Appendix G

MR. SLATER: Sorry?

* * *

First of all, there is no question in my mind that Pertamina, at least on this record, based on Mr. Slater's affidavit, there is no question in my mind that Pertamina had notice of my order to withdraw its injunctive relief request, and there is no question in my mind that they chose for their own reasons, maybe logistical, maybe intentional, not to comply with that request.

There is no question that the Court order was in effect from the moment I issued it onward, so I do find that Pertamina is in contempt, civil contempt, under the standards that have been adopted by the Fifth Circuit in American Airlines, Inc. versus Allied Pilots Association, 228 F3d. 574 at 581. And that is the year 2000.

* * *

THE COURT: I'm furious, Counsel. I'm furious. But I have issued what I think to be a temperate response. Don't test me.

* * * *

APPENDIX H — DECISION OF THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE DATED MARCH 27, 2003

IN HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 28 OF 2002

KARAHA BODAS COMPANY LLC

Plaintiff

and

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA)

Defendant

DECISION

* * *

Appendix H

(b) As a matter of law

17 If, contrary to KBC's primary submission that determination of the *lex arbitri* is a question of fact, it is necessary to construe the arbitration clauses in the contracts to determine the *lex arbitri,* then this court places reliance on the following matters, in coming to the conclusion that the answer remains, Swiss law

18 From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point "The curial law *(lex arbitri)* is normally but not necessarily the law of the place where the arbitration proceedings are held" (*per* Hobhouse J in *Dallal v Bank Mellat* [1980] at p 252 "The place" plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris) For the normal situation not to apply there must be strong pointers to the contrary Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors

(1) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not The contracts are specific as to the substantive law (Indonesian) but silent as to the lex arbitri Lord Mustill in *Channel Group v Balfour Beatty Ltd [1993]* AC at p 357 said

> Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the

> arbitration is to be held but in the absence of an explict choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible

Clearly, Pertamina and KBC did not make an "explicit choice" There are many other authorities in support of this general proposition, one being Potter J in *Sumitono v Oil & Natural Gas Commission* [1994] 1 LIoyd's Reports, at p 57

> There is it is true no express choice of curial law However, there is a clear requirement that the arbitration proceedings be held in London In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the seat' of the arbitration, ie the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings —"

It is acknowledged that the presumption may be rebutted by matters other than an express provision

to the contrary, however, it seems to me that in the present case Pertamina's attempt to do so is forlorn

(2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNCITRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the *lex arbitri* was to be Indonesian law the contracts would not have been signed I find It irresistible that the choice of Geneva as the "place" was also a choice that it was the formal "seat" in the legal sense By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place

(3) The UNCITRAL rules require that an award is made at the place (or seat) of the arbitration Accordingly, the preliminary award the award itself and the post-award decision were all expressly stated to be made to Geneva All these were done as a matter of course It was never argued that it should be otherwise

(4) Pertamina, as evidence of "strong pointers" to rebut the presumption rely, *inter alia*, on the fact that the contracts themselves are replete with references to the provisions of Indonesian law" The expression "replete with" somewhat overstates the position but they point out that the contracts expressly provide

for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure Article 650 2 (appointment of arbitrators) and 620 1 (time limits on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on "amiables compositeurs") has been invoked and Article 641 (rights of appeal) has been waived

In my judgment the existence of these provisions barely dents the fundamental principle in favour of Swiss law Both parties to this application have produced lengthy and learned academic expert opinions on the issue, and both counsel have argued the strengths and weaknesses of the competing opinions I propose to be extremely sparing in my citation of the various opinions because of the overwhelming weight to be attached to the underlying factual truth that the parties' choice of a neutral seat together with the absence of an express choice of different *lex arbitri* are the dominant factors in the equation which, in this case, results in the answer that commercial common sense demands that Indonesian law was not to be the *lex arbitri* I merely select one passage from the opinion of Mr. Robert Hornick, an American lawyer and academic of great experience in this field

* * * *

APPENDIX I — EXCERPTS OF ORAL EXAMINATION OF GEORGE CHAN

MICHAEL PILKINGTON: Good morning, Master.

MASTER WONG: Yes.

MICHAEL PILKINGTON: I appear for the judgment creditor in this matter and its an oral examination of Mr Chan, who is an officer of the Garnishee Pertamina Energy Trading Limited. So, Master, I have some preliminary comments I would like to make to you, Master, in relation to the background of this matter.

MASTER WONG: Yes.

MICHAEL PILKINGTON: And I think perhaps we can deal with before Mr Chan is actually sworn in to give evidence.

MASTER WONG: It appears to be a blatant breach of a Court order. And Mr Pilkington intends to explore the underlying reason.

Miss Lu, on your behalf, has objected to this line of questioning.

My observation is that this sort of line of questioning is fairly pertinent and can be properly asked within the scope of the Order for Oral Examination.

Save and except that the answer may be given by you could amount to a — may amount to a self-incrimination of yourself. In short, if somebody has stolen something from

others, under caution by the police he or she may elect to remain silent.

So even I will be allowing Mr Pilkington to ask you why in that sense you may exercise your right of silence. But certainly you are reminded that you should not lie to this Court. Otherwise you will be in serious trouble.

* * * *

Supreme Court, U.S.
FILED
AUG 24 2006
OFFICE OF THE CLERK

No. 05-1571

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

CAROLYN B. LAMM
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TABLE OF AUTHORITIES

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Flatow v. Alavi Foundation, No. 99-2409, 2000 WL 1012956 (4th Cir. July 24, 2000).....4

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), 313 F.3d 70 (2d Cir. 2002) ("*Pertamina I*").....*passim*

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Phaneuf v. Republic of Indonesia, 106 F.3d 302 (9th Cir. 1997).....7

Walker Int'l Holdings, Ltd. v. Republic of Congo, 415 F.3d 413 (5th Cir. 2005).....3

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Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611.....*passim*

Fed. R. Civ. P. 44.1.....*passim*

Fed. R. Civ. P. 69.....*passim*

Fed. R. Civ. P. 69 advisory committee's notes
to subdivision (a) (1937 Adoption) 2

Supreme Court Rule 15.6 1

Pursuant to Supreme Court Rule 15.6, Petitioner Ministry of Finance of the Republic of Indonesia files this Reply to disabuse the Court of erroneous points in the Brief in Opposition ("B.I.O."). For the reasons detailed in argument I below, the *undisputed* circuit conflict on choice of law under the FSIA is squarely at issue in this case. Furthermore, this open, percolated conflict puts the Second and Ninth Circuits—the circuits with the heaviest FSIA caseloads—at loggerheads on a fundamental issue under the FSIA (a statute for which Congress was especially concerned about national uniform application). The circuit split both requires and is ripe for this Court's resolution, and the B.I.O. distracts from, rather than illuminates, whether the inter-circuit conflict issue presently before the Court warrants certiorari. For the reasons detailed in argument II below, Respondent fails to address the second issue presented by the Ministry.

* * *

I. Respondent does *not* dispute that there is an express, open conflict in the circuits over whether the FSIA requires federal courts to apply federal common law choice of law rules or forum state rules. *Compare* Pet. 9-10, *with* B.I.O. 19-21. Instead, Respondent ignores or attempts to sidestep the undeniable, clean conflict with five unavailing points:

A. Respondent argues that because Rule 69(a) of the Federal Rules of Civil Procedure provides that execution proceedings "shall be in accordance with the practice and procedure of the state in which the district court" sits, the inter-circuit conflict over whether the FSIA requires a federal common law choice of law rule versus a forum choice of law rule is not at issue here because Rule 69(a)'s provision for state procedures governs. B.I.O. 21-22.

Respondent simply ignores Rule 69(a)'s express exception providing that state procedures bow to any

applicable federal statute such as the FSIA: "except that any statute of the United States governs to the extent that it is applicable." Respondent then misleadingly notes that the advisory committee's note to Rule 69(a) "contains a list of federal statutes governing execution or garnishment of property that the Advisory Committee considered to displace Rule 69. *This list makes no mention of the FSIA*." B.I.O. 21 n.3 (emphasis added).

The list does not mention the FSIA because the Advisory Committee drafted the note when Rule 69 was adopted in 1937—but the FSIA was not enacted until 1976 (and Rule 69 has not been amended substantively since 1970). Notably, the federal statutes on execution and exemption from execution that did exist when Rule 69 was enacted were expressly exempted from Rule 69(a)'s state-procedures requirement: "Statutes of the United States on execution, when applicable, govern under this rule. . . . Special statutes of the United States on exemption from execution are also continued." Fed. R. Civ. P. 69 advisory committee's note to subdivision (a) (1937 Adoption) (noting that such statutes were "among" those exempted). Plainly, the FSIA constitutes both a statute "of the United States on execution" and a "[s]pecial statute[] of the United States on exemption from execution[,]" thus falling squarely within both forward-looking and non-exhaustive categorical exemptions listed in the Advisory Committee's Note. *Id.*

Moreover, until the FSIA was enacted in 1976, the settled federal common law was that foreign states were absolutely immune from execution—regardless of liability. *See* Pet. 16 (collecting cases). Thus, Rule 69(a)'s provision for state procedures could *not* possibly have been intended to govern execution proceedings against a foreign state. Likewise, under Rule 69(a)'s express exception for applicable federal statutes, the FSIA currently governs all aspects of execution

against the property of foreign states—just as the federal common law rule on absolute immunity had pre-FSIA.

While the FSIA unquestionably governs all aspects of execution against the property of foreign states, the statute is silent on the proper choice of law. In this way, the FSIA's attachment and execution provisions are as silent on choice of law as are the FSIA's liability provisions. Indeed, Respondent does *not* dispute the FSIA's silence on choice of law. This statutory silence is the source of the avowed and undisputed circuit split. *See* Pet. 9-10. And for the reasons above, Rule 69 does *not* except this case from the undisputed inter-circuit conflict on choice of law under the FSIA.

Furthermore, the three authorities Respondent cites as purportedly holding that Rule 69 disposes of the circuit split are entirely unilluminating for the Court's determination of whether there is a certworthy split:

(i) *Walker International Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005), did not mention the circuit split and the court reached its decision on choice of law with little analysis because the parties did *not* dispute what choice of law rule applied: "[Appellant] acknowledges that Federal Rule of Civil Procedure 69(a) functions to apply state law in garnishment proceedings . . . ." *Id.* at 415. Moreover, the issue in the case (i.e., whether a private party asserting the sovereign immunity of a foreign state could collect attorneys' fees if successful in asserting that defense) did *not* implicate a conflict between federal and state law: "the FSIA does not supply law conflicting with Texas law on the issue of attorney's fees." *Id.* at 416.

The absence of conflict between the federal and state rules in *Walker* is in stark contrast to the choice of law conflict in this case, whereby the New York choice of law rule—authorizing execution on any property that can be

assigned or transferred, including future interests, without regard to whether the property is the debtor's property *only outside the United States*—conflicts with the FSIA's "in the United States" requirement by allowing execution on Pertamina's "future interest" in funds paid to Pertamina by the Ministry outside the United States, i.e., paid in Jakarta, Indonesia. *See* B.I.O. 23 (conceding that such funds "are only finally paid to Pertamina in Indonesia"); Pet. 20 (detailing how the New York choice of law rule creates a loophole in the FSIA's provision of absolute immunity for a foreign state's property outside the United States).

(ii) Similarly, *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1285 (11th Cir. 1999), did not mention the circuit conflict, and because the choice of law rule was *not* in dispute, the court reached its decision with no analysis beyond a string cite to Rule 69(a).

(iii) Remarkably, *Flatow v. Alavi Foundation*, No. 99-2409, 2000 WL 1012956, at *4 (4th Cir. July 24, 2000), stands for the *exact opposite* proposition from that argued by Respondent. According to *Flatow*:

> Although Rule 69(a) of the Federal Rules of Civil Procedure provides that "[t]he procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held," *the rule also provides* that "any statute of the United States governs to the extent that it is applicable." Moreover, if the Foundation is the agent or instrumentality of the Iranian Government, then the FSIA is the sole basis for gaining jurisdiction over it. *Therefore, it is appropriate to look to the FSIA.*

(Internal citations omitted) (emphases added).

B. Unable to dispute the circuit split, Respondent argues that the Ministry conceded on appeal that in this case there is

no difference between a federal common law versus New York choice of law rule. B.I.O. 22. But the Ministry's statement that "there is no real conflict here as to which choice-of-law rule to use[,]" Ministry Br. at 42, related solely to the issue of choosing Indonesian law, as opposed to New York law, as the substantive rule of decision: "Without question, under the greatest or significant interest test entailed in the federal or New York choice-of-law rules, Indonesia—***not*** New York—has the paramount interest in this litigation and the underlying dispute." *Id.* at 43. Similarly, the Ministry protected itself by arguing that, "Assuming *arguendo* New York substantive law applied, the Government of Indonesia would still own the PSC Revenues." *Id.* at 48. But this choice of law issue does not concern the threshold jurisdictional issue raised under the FSIA concerning a federal common law choice of law rule to determine what property of a foreign sovereign is amenable to execution. *See Fid. Partners, Inc. v. First Trust Co. of N.Y.*, 58 F. Supp. 2d 55, 61 (S.D.N.Y. 1999) (applying federal common law in deciding that assets outside the United States are not subject to attachment under the FSIA).

No disinterested person could read either the Ministry's opening or reply briefs on appeal as arguing anything other than fervently for the application of federal common law as to the FSIA issues. Ministry Br. at 41 ("The determination of ownership of the PSC Revenues is governed by a federal common law choice-of-law rule because this case involved the amenability of a foreign state and its property to suit and restraint."); Ministry Reply at 17:

> KBC's wrongful attachment of the Government's PSC Revenues raises unique federal concerns: namely, the amenability of the Government to suit, and the restraint of the Government's property when jurisdiction over the Government is lacking. These

> concerns mandate application of a federal common law choice-of-law rule to the question of ownership of the restrained PSC Revenues.
>
> Nor does Rule 69(a) of the Federal Rules of Civil Procedure, which requires use of state practice and procedure on execution, help KBC. Rule 69(a) is limited by any applicable federal statute: it applies the law of the forum state, "*except* that *any* statute of the United States governs to the extent it is applicable." The FSIA governs KBC's attachment of the Government's property held at BofA, *and state practice and procedures cannot displace the FSIA's provisions.*

(Internal citation and footnote omitted) (last emphasis added).

To be sure, the Second Circuit recognized a difference between federal common law and New York choice of law rules, and unequivocally characterized the Ministry as arguing for a federal common law choice of law rule when the court rejected that argument in favor of a New York choice of law rule. *Pertamina I*, Pet.App. 26a ("The latter questions, the Ministry argues, are governed by federal common law choice of law rules. . . . New York choice of law rules therefore govern our decision.") (internal citation omitted).

C. The above excerpts from the Ministry's briefs on appeal also refute Respondent's third conflict-avoidance argument: that the Ministry did not raise on appeal the argument that federal common law displaces Rule 69(a). B.I.O. 23. The portion of the Ministry's Reply brief block quoted above, for example, plainly argues that federal common law displaces Rule 69(a).

D. Respondent's fourth conflict-avoidance argument is that the Second Circuit's failure to apply a federal common

law choice of law rule does not matter because the Retention Fee funds that were improperly restrained under the New York choice of law rule were eventually recharacterized as Refinery Funds and executed upon on that basis. B.I.O. 23.

Respondent ignores that the restraints were only effective because of the improperly applied New York choice of law rule. If this case had arisen in the Ninth Circuit, the courts would have applied a federal common law choice of law rule that would have precluded execution on Pertamina's "future interest" in funds that the Ministry pays Pertamina only outside the United States. Such a rule would have instructed the courts to apply federal common law principles to determine what property lies "in the United States"—principles developed, for example, in the context of the Act of State doctrine, where courts have determined the situs of intangible property to be "where the incidents of the debt, as a whole, place it." *Callejo v. Bancomer, S.A.* 764 F.2d 1101, 1123 & n. 31 (5th Cir. 1985); Pet. 20 & n.4. Under these federal law principles, Pertamina's Retention Fee, incurred and paid in Indonesia for services rendered in Indonesia, falls outside the United States. *See Callejo*, 764 F.2d at 1125 (location of certificates of deposit nominally held by American bank was Mexico, because certificates were issued by Mexican bank, payable in Mexico and American bank was not final repository of deposits); *cf. Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (applying federal common law to determine application of FSIA immunity exception).

Under the Ninth Circuit conflict approach, there would not have been money purportedly belonging to Pertamina on which to execute. That *opposite outcome* is the *touchstone of a genuine circuit conflict*, and the fundamental nature of that conflict, particularly under the FSIA, warrants certiorari.

E. Respondent's final argument is that the Ministry prevailed in having the courts apply Indonesian law as the substantive rule of decision, thus the choice of law rule used is irrelevant. B.I.O. 24. The B.I.O. itself shows the fallacy of this argument. Respondent concedes elsewhere that "pursuant to the express mandate of Rule 69, the Court looked to New York law to determine the **types** of property that are subject to execution, that is, to determine 'what assets are subject to enforcement, and thus available to judgment creditors.'" B.I.O. 19 (quoting Pet. App. 22a) (further internal quotation marks and citation omitted).

Thus, it is precisely because the courts below relied on a New York choice of law rule that a "future interest" in funds paid outside the United States was deemed susceptible to restraint. Once that determination was made at what Respondent terms the "first step," B.I.O. 19, the courts' "second-step" application of Indonesian law as the substantive rule of decision could *not* cure the FSIA-contravening outcome of allowing execution on property *not* "in the United States."

II. Respondent likewise sidesteps the Ministry's second issue by framing it as entailing the proper deference due to a State's interpretation of its laws. B.I.O. 12. The issue presented here, however, is whether federal courts, in determining foreign law under Rule 44.1 of the Federal Rules of Civil Procedure, can simply presume that foreign law is the same as U.S. law without undertaking any independent analysis of the underlying foreign law.

Even the cases cited by Respondent, B.I.O 15, support the Ministry's argument that the issue presented is worthy of certiorari because federal courts apply an inconsistent standard with respect to the use of such presumptions under Rule 44.1. *Compare Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) ("The parties, therefore,

carry the burden of proving foreign law; where they do not do so, we 'will ordinarily apply the forum's law.'") (internal citation omitted), *with Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) (where parties failed to present Mexican law and district court avoided analysis of Mexican law and applied New York law, Court of Appeals conducted its own independent analysis of Mexican law: "We urge district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations.").

Specifically with respect to the determination of foreign law in this case, neither the district court nor the Court of Appeals considered the Indonesian property concept of "bezitter" as applicable to the Republic's relationship with Pertamina. Instead, the Court of Appeals presumed that the Republic's relationship to Pertamina vis-à-vis the Refinery Revenues was the same as a guarantor under U.S. law.

Respondent concedes that "neither of the courts below used the terms 'bezitter' or 'eigendomsrecht' in their analysis," B.I.O 14 n.1, but argues that the courts' conclusion that Pertamina had exclusive use of the revenues "addressed those concepts and supported a conclusion that they were inapplicable." *Id.* Respondent's argument misses the key point about a bezitter. As a bezitter, Pertamina's possession of the Refinery Revenues entitled it to spend and control those funds for any purpose within its budgetary authority. But the critical determination distinguishing bezitter from owner is whether Pertamina or the Republic has the final right to dispose of these revenues as it sees fit. That right—eigendomsrecht—determines the funds' ownership. Respondent's argument that Pertamina's "exclusive use of the Refinery Funds compelled a conclusion that it owed those funds outright[,]" *id.*, is based on only half the analysis and, as such, does not rebut Pertamina's status as a bezitter. By failing to analyze Pertamina and the Republic's relationship

in terms of bezitter-eigendomsrecht, the courts stopped short of undertaking the next, requisite step to consider whether the Republic had the final right under the BBM legal regime to dispose of these revenues as it saw fit. *Cf.* Pet.App. 37a-38a (conducting a comparative analysis of Indonesian executive branch's law-making discretion with U.S. system).

Respondent's argument that Dr. Gautama has acknowledged in his writings that Indonesian law permits guarantee relationships is a non-sequitur that likewise does not address the issue the Ministry raises. B.I.O. 17. *None* of the opinions of Indonesian law submitted by Dr. Gautama in this case discuss guarantees. The fact that he has written that Indonesian law recognizes guarantee relationships is irrelevant to the issue presented. Nor can Respondent trivialize the Second Circuit's statement that "Indonesia acts like a guarantor," Pet.App. 71a, by arguing the statement is "illustrative." B.I.O. 18. The basis of the Second Circuit's conclusion that Pertamina owns the Refinery Revenues is precisely because it viewed Indonesia's relationship to Pertamina as a guarantor, which "does not deprive Pertamina of control over the refinery funds." Pet. App. 71a.

The Court of Appeals's failure to undertake the requisite analysis of bezitter stemmed from its presumption that the Republic's relationship to Pertamina under Indonesian law was similar to that of a guarantor under U.S. law. Rule 44.1 does not call for such a presumption, and the presumption cannot be sanctioned in the absence of any analysis of the underlying foreign legal principles by the federal court.

* * *

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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